

No. 12510

United States
Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,

vs.

CIA. LUZ STEARICA, a Corporation,
Appellee.

Apostles on Appeal

Appeal from the United States District Court,
Western District of Washington,
Northern Division.

FILED

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PAUL P. O'BRIEN,

CLERK

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INDEX

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	PAGE
Answer and Interrogatories.....	6
Appeal:	
Appellant's Statement of Points and Designation on	363
Certificate of Clerk to Apostles on.....	359
Citation on	41
Notice of	36
Order Granting Petition for.....	34
Petition for	33
Appellant's Statement of Points on Appeal and Designation of Parts of the Apostles.....	363
Assignment of Errors by Respondent United States of America.....	37
Certificate of Clerk to Apostles on Appeal....	359
Citation on Appeal.....	41
Decree	32
Findings of Fact and Conclusions of Law....	24
Interrogatories Propounded by Respondent to Libellant	10

INDEX	PAGE
Libel	2
Libelant's Answers to Respondent's Interrogatories	16
Exhibit A—Letter Dated March 2, 1946..	19
Libelant's Motion to Require Respondent to Produce	20
Motion to Omit Printing of Exhibits.....	365
Names and Addresses of Proctors.....	1
Notice of Appeal	36
Order Upon Exceptions of Libelant to Answer of Respondent	14
Order Granting Petition for Appeal.....	34
Order on Libelant's Motion to Require Respondent to Produce Documents.....	23
Petition for Appeal.....	33
Transcript of Proceedings at Trial.....	43

Witnesses:

Barreto, Antonio (Deposition)

—direct	82
—cross	91

Caswell, Alick (Deposition)

—direct	215
—cross	227

INDEX

PAGE

Witnesses—(Continued) :

de Camargo, Braz (Deposition)

—direct 323

Terreira, Jorge (Deposition)

—direct 99

—cross 105

Gow, James

—direct 258

—cross 273

—redirect 278

Herold, Frederick (Deposition)

—direct 115

—cross 122, 134

Lane, Howard Francis (Deposition)

—direct 138, 159, 179

—cross 181

—redirect 188

Luiz, Izaias (Deposition)

—direct 53

—cross 58

	INDEX	PAGE
Witnesses—(Continued) :		
Owens, Francis P.		
—direct		333
—cross		350
—redirect		353
Parsons, Anthony (Deposition)		
—direct	49,	189
—cross		202
—redirect	212,	214
—recross		213
Punnett, Percy W. (Deposition)		
—direct		281
—cross		301
Ramos, Francisco (Deposition)		
—direct		66
—cross		74
Williams, Thomas		
—direct		233
—cross		249
—redirect		255
—recross		256

NAMES AND ADDRESSES OF PROCTORS

CLAUDE E. WAKEFIELD and
M. BAYARD CRUTCHER, of
BOGLE, BOGLE & GATES,

Proctor for Appellant,
603 Central Bldg.,
Seattle 4, Washington.

LANE SUMMERS and
CHARLES B. HOWARD of
MERRITT, SUMMERS & BUCEY,

Proctors for Appellee,
840 Central Bldg.,
Seattle 4, Washington.

In the United States District Court for the Western
District of Washington, Northern Division

In Admiralty No. 15036

CIA. LUZ STEARICA, a Corporation,
Libelant,

vs.

UNITED STATES OF AMERICA,
Respondent.

LIBEL

The libel of Cia. Luz Stearica, a corporation as libelant, against the United States of America, as respondent, in a cause of contract and cargo damage, civil and maritime, alleges as follows:

I.

At all times hereinafter mentioned libelant was, and it still is, a corporation duly organized, created and existing under and by virtue of the laws of the Republic of Brazil, with an office and place of business at Rio de Janeiro, Brazil.

II.

At all times hereinafter mentioned, respondent, United States of America, was, and it still is, a corporation sovereign and owned, operated and controlled the steamship "Sweepstakes."

III.

At all times hereinafter mentioned, the steamship "Sweepstakes" was employed and operated by respondent, United States of America, as a merchant vessel in the common carriage of merchandise for hire between, among others, the port of New York and the port of Rio de Janeiro.

IV.

The steamship "Sweepstakes" now is within the district and within the jurisdiction of this Honorable Court.

V.

If the steamship "Sweepstakes" were privately owned or operated a proceeding in admiralty in rem against her and in personam against her owner could now be maintained by libellant.

VI.

Libellant elects to proceed against respondent, United States of America, upon the principles both of a libel in personam and of a libel in rem.

VII.

On or about the 31st day of January, 1946, International Milling Co. delivered to the steamship "Sweepstakes" and to respondent at the port of New York, 6000 sacks of wheat flour and 4500 sacks of wheat flour, in good order and condition, and respondent then and there accepted the said mer-

chandise so delivered to it and agreed to carry the same, as a common carrier, on the said steamship "Sweepstakes" from the said port of New York to the port of Rio de Janeiro, there to be delivered, in like good order and condition as when shipped, to the order of said shipper, in consideration of an agreed freight and in accordance with the valid terms of two certain bills of lading then and there signed and delivered to the shipper by the duly authorized agent of said steamship "Sweepstakes" and of respondent.

VIII.

Thereafter, respondent stowed the merchandise described in Article VII hereof on board the said steamship "Sweepstakes," in the same good order and condition as when received by it, and the said vessel, having the said merchandise on board, sailed from the port of New York, and subsequently arrived at the port of Rio de Janeiro, where the respondent and said steamship "Sweepstakes" delivered a part of the said merchandise; the part delivered, however, was not in like good order and condition as when delivered to respondent and said steamship at said port of shipment but, on the contrary, was seriously injured and damaged by contact with water and/or other substances to libelant unknown. Neither the respondent nor the steamship "Sweepstakes" has delivered the said missing flour at the port of Rio de Janeiro, or at any other port.

IX.

Libelant was at all material times the owner of the shipments referred to in Article VII hereof.

X.

By reason of the premises libelant has sustained damages in the sum of Ten thousand dollars (\$10,000), so far as the same can now be estimated, no part of which has been paid, although payment thereof has been duly demanded.

XI.

All the valid conditions precedent of said contracts of carriage to be performed by libelant have been performed.

XII.

All and singular the premises are true and within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libelant prays that upon service of a copy of this libel on the United States Attorney for this district and the mailing of a copy thereof to the Attorney General of the United States, and the filing of a sworn return of such service and mailing in accordance with law, the respondent be required to appear and answer all and singular the matters aforesaid, according to the principles of law and rules of practice obtaining in like causes between private parties, and that this Honorable Court be pleased to decree to your libelant its damages, with interest and costs, and that your libelant may have

such other and further relief as in law and justice it may be entitled to receive.

BIGHAM, ENGLAR, JONES &
HOUSTON,

MERRITT, SUMMERS &
BUCEY,

/s/ LANE SUMMERS,
Proctors for Libelant.

Duly verified.

[Endorsed]: Filed January 22, 1947.

[Title of District Court and Cause.]

ANSWER AND INTERROGATORIES

Comes now the Respondent, United States of America, and for Answer to the Libel herein admits, denies and alleges as follows:

I.

Respondent has no information sufficient to form a belief as to the allegation of Paragraph I and therefore denies the same.

II.

Respondent admits the allegations of Paragraphs II, III and IV.

III.

Respondent requires Libelant to submit proof in support of the allegations of Paragraphs V and VI and does not admit the same.

IV.

Respondent admits Paragraph VII except as to the alleged good order and condition of the flour upon delivery to the vessel as to which Respondent requires strict proof by Libelant.

V.

Respondent denies Paragraph VIII and denies that the merchandise, consisting of flour, was discharged from the vessel in a damaged condition and denies that any of said flour was missing or short upon delivery at destination.

VI.

Respondent has no information sufficient to form a belief as to the allegations of Paragraphs IX, X, XI, and XII and therefore denies the same, and particularly denies that Libelant has sustained loss or damage for which Respondent or the said vessel is liable in the sum of \$10,000.00 or any other sum whatsoever.

Further Answering and as a First Affirmative
Defense Herein, Respondent Alleges:

I.

That the shipments referred to in the Libel were carried by the Respondent aboard said vessel pursuant to the valid terms of bills of lading issued by the Respondent United States and delivered to the shippers of cargo which said bills of lading were on the regular form of Warshiplading (Form No. WSA-145) of the United States Maritime Commis-

sion, and incorporated therein specifically by reference the Carriage of Goods by Sea Act (46 USC 1300 et seq) which said bills of lading and the said statutes governed the undertakings of the parties with respect to the carriage of all of said cargo; that the originals or exact copies of said bills of lading are in the possession of the Libelant and by this reference are fully incorporated herein.

II.

That the said bills of lading contain among others the following provisions:

“This bill of lading shall have effect subject to the provisions of the Carriage of Goods By Sea Act of the United States of America approved April 16, 1936, which shall be deemed to be incorporated herein and nothing herein contained shall be deemed as surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. The provisions stated in said Act (unless or except as may be otherwise specifically provided herein) shall govern before the goods are loaded on and after they are discharged from the ship and throughout the entire time the goods are in the custody of the carrier * * *

III.

That due diligence was exercised to make said vessel seaworthy and properly manned, equipped and supplied at the beginning of the voyage. That any damage or loss sustained by or to said cargo referred to in the Libel herein while in the custody

of the Respondent or of the said vessel was not caused or contributed to by any fault or neglect on the part of the Respondent or on the part of the vessel but was the result of one of the causes excepted in the bill of lading hereinabove referred to and excepted in the Carriage of Goods By Sea Act hereinabove referred to to wit, perils of the sea and/or act or omission of the shipper or owner of the goods his agent or representative and/or inherent defect, quality or vice of the goods and/or insufficiency of packing, and that if any of said damage was the result of negligence of the officers or crew or other agents or representatives of the Respondent or of the vessel such negligence consisted of faults or errors in navigation or in the management of the vessel for which the Respondent and the said vessel are excused from liability pursuant to the applicable provisions of the said bill of lading and the said Carriage of Goods By Sea Act.

Further Answering and as a Second Affirmative
Defense Herein, Respondent Alleges:

I.

That any loss or damage to said cargo of flour as alleged in the Libel was solely caused by events or conditions and causes arising subsequent to the discharge of said vessel and said cargo after the responsibility of the Respondent and the vessel therefore had terminated and was the result of causes not within the control of Respondent or of

the vessel and as a result of causes or conditions for which the vessel and Respondent are not liable.

Wherefore, Respondent prays that the Libel herein be dismissed and that Libelant take nothing thereby and that the Respondent have and recover its costs and disbursements and for such other and further relief as may be just in the premises.

/s/ J. CHARLES DENNIS,
United States Attorney.

BOGLE, BOGLE & GATES,
/s/ CLAUDE E. WAKEFIELD,
Of Counsel,
Proctors for Respondent.

Duly verified.

[Endorsed]: Filed Nov. 15, 1947.

[Title of District Court and Cause.]

INTERROGATORIES PROPOUNDED BY
RESPONDENT TO LIBELANT

Comes now Respondent and propounds interrogatories to the Libelant to be answered in writing and under oath as follows, to wit:

Interrogatory No. 1: On what date or dates was the cargo of flour in question discharged from the "Sweepstakes" at Rio de Janeiro and delivered to Libelant?

Interrogatory No. 2: When the cargo was discharged from the vessel at Rio de Janeiro state when and how it was delivered by the ship, i.e. into customs warehouse or into railway cars, wagons, drays or trucks?

Interrogatory No. 3: If your answer to Interrogatory No. 2 above is that said cargo was discharged from the vessel into railway cars, wagons, drays or trucks, please state the following:

a) Did Libelant, its agent or representatives make arrangements for such discharge or furnish such vehicles?

b) If Libelant did not make arrangements for the vehicles into which cargo was discharged from the vessel state who did do so?

c) State the exact character of the vehicle or vehicles, i.e. whether covered or open and if open, whether the cargo was covered by tarpaulins or otherwise how protected?

d) How many such vehicles were loaded with Libelant's shipments of flour?

Interrogatory No. 4: State the date when the cargo in question was received at the premises of the Libelant or its agent or representative or consignee.

Interrogatory No. 5: State what was done, showing the exact movements of the cargo from the time of discharge from the vessel into a vehicle or vehicles until the cargo arrived at Libelant's premises or the premises of an agent, representative or consignee of Libelant.

Interrogatory No. 6: Set forth the daily rainfall at Rio de Janeiro on each day between the time the cargo in question was discharged from the vessel and the time it arrived at Libelant's premises or the premises of its agent, representative or consignee, both dates inclusive.

Interrogatory No. 7: Where was this cargo kept or stored between the time of discharge from the vessel and the time of delivery at Libelant's premises.

Interrogatory No. 8: Was the alleged damaged cargo surveyed by a surveyor and on what date and where and by whom?

Interrogatory No. 9: Was Respondent or any agent or representative of Respondent or of the said vessel given notice of the alleged damage and of the survey and invited to attend or given any other opportunity to survey or inspect the alleged damage?

Interrogatory No. 10: If your answer to the foregoing Interrogatory No. 9 is that notice and opportunity was given to Respondent to survey or inspect the cargo attach a copy, if written, or state the exact facts including when and to whom given, if oral. If your answer to the foregoing interrogatory is in the negative state why such notice and opportunity to survey or inspect the damage was not given to the Respondent, its agent or representative or to an agent or representative of the vessel.

Interrogatory No. 11: State the exact condition of the cargo on the date of the survey, including

the number of bags affected (damaged or short or slack), the extent of wetting or other damage, whether actually wet at the time of survey or whether merely stained and caked or whether both wet, stained and caked.

Interrogatory No. 12: Was any survey or inspection made by Libelant or any agent, representative or consignee of Libelant of the condition of the shipment of flour at the time the said shipment was actually being discharged from the vessel or immediately thereafter?

Interrogatory No. 13: If such a survey or inspection was made as is referred to in Interrogatory No. 12 please set forth a copy if written, or if oral, state who made it and when and where and the result found.

Interrogatory No. 14: Was any survey or inspection of the shipment of flour made at all by anyone other than at the premises of the Libelant on March 6, 1946? If your answer is in the affirmative please advise in detail who, when and where made and set forth a copy, or if oral set forth the details and findings.

Interrogatory No. 15: Was an inspection or report on this shipment made by the Brazilian Customs authorities at the time of discharge or at any time thereafter? If not, state why not? If such inspection was made please furnish a copy or set forth the findings in such inspection or a report by or for the Brazilian Customs authorities.

Interrogatory No. 16: State the invoice value of

the shipments of flour in detail as to price per bag.

Interrogatory No. 17: State the market value of the shipments of flour as to price per bag at Rio de Janeiro.

Interrogatory No. 18: State how the alleged damage of \$10,000.00 as set forth in the Libel is determined and arrived at as the alleged measure of Libelant's damage.

/s/ J. CHARLES DENNIS,
United States Attorney.

BOGLE, BOGLE & GATES,
/s/ CLAUDE E. WAKEFIELD,
Of Counsel, Proctors for the
Respondent.

[Endorsed]: Filed November 15, 1947.

[Title of District Court and Cause.]

ORDER UPON EXCEPTIONS OF LIBELANT
TO ANSWER OF RESPONDENT

Libelant's exceptions to respondents answer having duly and regularly come on for hearing upon the 24th day of November, 1947, the undersigned Judge presiding; the court having considered the same, and argument of opposing counsel relative thereto, but having reserved his ruling to allow respondent's proctors time within which to obtain further investi-

gation to enable amendment of said answer; and it now appearing from statements of proctors of record that an agreement has been reached upon the amendment of said answer:

Now, Therefore, it is hereby Ordered as follows:

(1) That libelant's exceptions to the first affirmative defense of respondent's answer are sustained;

(2) That respondent is allowed until December 24, 1947, within which to amend the allegations of said first affirmative defense of the answer to set forth the specific exceptions, if any, of the bill of lading or the Carriage of Goods by Sea Act upon which it relies.

Done in open court this 1st day of December, 1947.

/s/ JOHN C. BOWEN,
U. S. District Judge.

Presented by:

/s/ CHARLES B. HOWARD,
Of Proctors for Libelant.

Approved as to form:

/s/ J. CHARLES DENNIS,
U. S. Atty.

BOGLE, BOGLE & GATES,

/s/ CLAUDE E. WAKEFIELD,
Of Counsel.

[Endorsed]: Filed Dec. 1, 1947.

[Title of District Court and Cause.]

LIBELANT'S ANSWERS TO RESPONDENT'S
INTERROGATORIES

Comes now the libelant and pursuant to order of the court entered herein on December 1, 1947, makes the following answers in writing and under oath to respondent's interrogatories propounded to libelant on November 15, 1947.

I.

Interrogatory No. 2. Cargo was discharged into wagons.

II.

Interrogatory No. 3(a). Wagons were furnished by the port administration.

(b) See answer to (a) above.

(c) Open type, covered with heavy waterproof tarpaulins.

III.

Interrogatory No. 4. March 2, 1946.

IV.

Interrogatory No. 5. Shipment was carried directly from point of discharge to consignee's premises in wagons. It did not pass through custom's warehouse.

V.

Interrogatory No. 7. See answer to Interrogatory No. 5 in paragraph IV above. There was no delay en route in delivering the shipment to consignee's warehouse.

VI.

Interrogatory No. 8. Shipment was surveyed on March 6, 1946, at consignor's premises by Cia Imobiliaria Financeira Americana, S. A.

VII.

Interrogatory No. 9. Consignee filed written notice of claim for damage to shipment with carrier at Rio de Janeiro on March 2, 1946.

VIII.

Interrogatory No. 10. Copy of letter of March 2, 1946, is attached hereto as Exhibit "A."

IX.

Interrogatory No. 11. 3087 bags of wheat flour were found partly spoiled by salt water. Depreciation 40%. Chemical analysis of samples of wheat flour showed presence of salt water. There was a leakage of contents in 197 bags resulting in a net shortage of 880 kos. of flour.

X.

Interrogatory No. 12. Not so far as is known at the present time.

XI.

Interrogatory No. 16. \$4.75 U. S. per bag.

XII.

Interrogatory No. 17. Sound market value at Rio de Janeiro, duty paid, of each bag of American wheat flour weighing 50 kg. as of date of discharge

was Cruzeiros 126.00, which at the then prevailing rate of currency exchange would be \$6.62 U. S. funds per bag.

XIII.

Interrogatory No. 18. Libelant's claim is now computed in the total amount of \$8,428.24, U. S. funds, which is arrived at as follows:

3087 bags wheat flour found partly spoiled by salt water—@ \$6.61½ U. S. per bag (Cruzeiros 126.00 x \$.0525 U. S. exchange rate) Sound arrived value . . .	\$20,420.51 U. S.
Loss by depreciation 40%	\$8,168.20 U. S.
197 bags sustained leakage of con- tents resulting in shortage of 880 kilos @ \$.1324 U. S. per kilo	116.51 U. S.
Survey fees, bank charges and set- tling expenses	143.53 U. S.
	<hr/>
	\$8,428.24 U. S.

MERRITT, SUMMERS &
BUCEY,

/s/ CHARLES B. HOWARD,
Proctors for Libelant.

EXHIBIT "A"

Rio de Janeiro, 2 de Marco de 1946.

A

MOORE McCORMACK (NAVEGACAO) S. A.

Praco Maua, 7 - 7°and.

Rio de Janeiro

Prezados Senhores.

Ref.: 10.500 sacos com 525.000 ks de farinha
embarcados em New York no vapor
"Sweepstakes," conforme conhecimen-
tos datados de 31-1046.

Tendo notado uma certa quantidade de sacos
rasgados com perda de conteudo, e outros tantos
molhados, na descarga da farinha em referencia,
avisamos a VV.SS. que responsabilizamos os arma-
dores do vapor, como transportadores, pelas refer-
idas avarias.

Sem mais, subscrevemo-nos com elevada estima
e consideracao,

De VV.SS.

Amos, Atos e Obrdos

COMPANHIA LUZ STEARICA

Sec.Moinho da Luz

Director.

H/FJ.

Duly verified.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 10, 1948.

[Title of District Court and Cause.]

LIBELANT'S MOTION TO REQUIRE
RESPONDENT TO PRODUCE

Comes now the libelant above named and, pursuant to Admiralty Rule 32, moves the court for an order directed to the respondent herein requiring the production at a time and place to be specified by the court of the following:

(1) Any and all smooth deck log books for the S.S. "Sweepstakes" for voyages and periods between and including December, 1945, and March, 1946, which have not already been identified and attached as exhibits to depositions of ship's officers taken on behalf of respondent.

(2) Any and all rough deck log books for the S.S. "Sweepstakes" for the voyages and periods between and including December, 1945, and March, 1946.

(3) Originals and/or available copies of any and all dock receipts issued by respondent, its agent, Moore-McCormack Lines, Inc., or any other agent, employee or representative of respondent at the port of New York covering shipment of wheat flour aboard the S.S. "Sweepstakes" consigned to libelant, Cia. Luz Stearica as referred to in the libel.

(4) Any and all executed copies of bills of lading issued by respondent or its agent, Moore-McCormack Lines, Inc., covering the shipment of wheat flour aboard the S.S. "Sweepstakes" consigned to

libelant Cia. Luz Stearica and any other copies of the bills of lading issued on the above shipment in the possession of respondent, its agents or employees, which contain any notation or endorsement as to condition of the flour in said shipment at time of loading or discharging.

(5) Any report, memorandum or written record made by or to respondent or its agent, Moore-McCormack Lines, Inc., or other employee or agent of respondent in the regular course of business relative to the condition of, or any damage observed on, the shipment of wheat flour consigned to libelant Cia. Luz Stearica, as referred to in the libel, either at port of loading or at port of discharge.

(6) Any and all carbon copies of hatch tallies for the shipment of flour consigned to libelant Cia. Luz Stearica, which are reported to have been delivered by the chief officer of the S.S. "Sweepstakes" to stevedore foreman or representative or employee of respondent or its agent, Moore-McCormack Lines, Inc., at the port of Rio de Janeiro.

(7) Any and all written receipts or similar documents obtained by respondent or its agent, Moore-McCormack Lines, Inc., from the libelant or its representatives upon discharge and delivery of the shipment of wheat flour from the S.S. "Sweepstakes" to libelant at the port of Rio de Janeiro.

(8) Any written report made by the master, first mate, purser, or other officer aboard the S.S. "Sweepstakes" to respondent or its agent,

Moore-McCormack Lines, Inc., in the regular course of business relative to the condition of the shipment of wheat flour consigned to Cia. Luz Stearica, as referred to in the libel, either at the port of loading or discharge.

(9) Any written report of survey or analysis secured by respondent as to the condition of the shipment of wheat flour consigned to Cia. Luz Stearica as referred to in the libel, either at the port of New York or at the port of Rio de Janeiro.

This motion is based upon the files and records herein and upon the affidavit attached hereto.

MERRITT, SUMMERS &
BUCEY,

/s/ CHARLES B. HOWARD,
Proctors for Libellant.

Duly verified.

[Endorsed]: Filed March 9, 1949.

[Title of District Court and Cause.]

ORDER ON LIBELANT'S MOTION TO RE-
QUIRE RESPONDENT TO PRODUCE
DOCUMENTS

It appearing that libelant moved the Court for an order requiring respondent to produce certain documents under Supreme Court Admiralty Rule 32, and that said motion was regularly noted for hearing on March 14, 1949, before the undersigned judge of the above-entitled court; and

It further appearing that the proctors for libelant and respondent have agreed upon the production of documents as set forth in said motion, and the Court being otherwise fully advised in the premises; now, therefore,

It Is Hereby Ordered that respondent shall be, and it is hereby required to produce all of the documents specified in sub-paragraphs 1 through 9 of said motion which may now be in the possession of respondent, its agents, employees or proctors, except only those documents which may have already been offered and identified as exhibits to depositions of ship's officers taken on behalf of respondent; and, it is further

Ordered that respondent shall produce the aforementioned documents at the office of its proctors, Messrs. Bogle, Bogle and Gates, Central Building, Seattle, Washington, during the week of March 14, 1949, as agreed upon by counsel for the respective parties, and that any documents not then available

to proctors for respondent shall be produced and made available to proctors for libelant for inspection promptly upon receipt thereof.

Done in Open Court, this 14th day of March, 1949.

/s/ JOHN C. BOWEN,
Judge.

Approved by:

BOGLE, BOGLE & GATES,
/s/ CLAUDE E. WAKEFIELD,
Proctors for Respondent.

Presented by:

MERRITT, SUMMERS &
BUCEY,
/s/ CHARLES B. HOWARD,
Proctors for Libelant.

[Endorsed]: Filed March 14, 1949.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause having come on regularly for trial in the above-entitled court before the undersigned judge thereof, on October 28, 1949, and having been continued from time to time and concluded on November 5, 1949; libelant appearing by Charles B. Howard of its proctors, and respondent

appearing by Claude E. Wakefield and Bayard Crutcher of its proctors; and the court having duly considered the evidence and exhibits submitted by the respective parties and the arguments of counsel for the respective parties, together with the trial briefs and memoranda of authorities filed by each of the parties, and being fully advised in the premises and having orally announced its decision thereon; does now make the following

Findings of Fact

I.

That libellant is and during all times hereinafter mentioned was a corporation duly organized, created and existing under and by virtue of the laws of the Republic of Brazil, with an office and place of business at Rio de Janeiro, Brazil.

II.

That respondent, United States of America, is and during all times hereinafter mentioned has been a sovereign corporation and was the owner of that certain steamship known as the "Sweepstakes." That in 1946 the steamship "Sweepstakes" was employed and operated by the respondent, United States of America, as a merchant vessel in the common carriage of merchandise for hire between the ports of New York and Rio de Janeiro, among others. That at the time of commencement of this action said vessel was afloat on navigable waters within the territorial jurisdiction of the United

States and within the admiralty and maritime jurisdiction of the above-entitled court, being in the port of Seattle, Washington.

III.

That if the steamship "Sweepstakes" were privately owned or operated, a proceeding in admiralty in rem against her and in personam against her owner could be maintained by libelant. That libelant did elect to proceed against respondent, United States of America, upon the principles both of a libel in personam and of a libel in rem. That the respondent, United States of America, as a sovereign corporation, has given its consent to be sued by reason of the provisions and terms of that act commonly known as the Suits in Admiralty Act and/or the Public Vessels Act, 46 U.S.C. §§741 to 752, and 46 U.S.C. §§781 to 790.

IV.

That on or about the 31st day of January, 1946, International Milling Company delivered to the steamship "Sweepstakes" and to respondent at the port of New York a total of 10,500 bags of wheat flour, each containing a quantity of 50 kilograms, which flour was accepted by respondent under the terms of two certain bills of lading identified as bills of lading No. 37 and No. 74. That respondent accepted said flour and agreed to carry the same as a common carrier on the said steamship "Sweepstakes" from the port of New York to the port of Rio de Janiero, to be delivered, in like good order

and condition as when shipped, to the order of said shipper, in consideration of agreed freight moneys which were paid.

V.

That libelant had legal title to the aforesaid shipment of flour and is the sole owner of the right to sue and recover thereon and is entitled to maintain this action against the respondent for the damages sustained to the flour in this ship—as covered by bills of lading No. 37 and No. 74.

VI.

That at the time of delivery to and receipt of said 10,500 bags of flour by the respondent, said flour was in apparent good order and condition and was in fact in actual good order and condition. That said flour was loaded and stowed by respondent on board the steamship “Sweepstakes” which thereafter sailed from the port of New York and subsequently arrived at the port of Rio de Janeiro on or about February 20, 1946, where the respondent and the said steamship “Sweepstakes” discharged and delivered the flour in bad order by reason of its being damaged, destroyed and a portion thereof rendered wholly valueless.

VII.

That the bad order and damage to the aforesaid flour shipment at the port of Rio de Janeiro, Brazil, was in the nature of sea water damage to said flour caused during the voyage and before discharge, and while in the custody of the respondent as carrier.

That the sole proximate cause of the aforesaid damage was the negligence of the respondent, as carrier, in the improper care of said flour while in transit aboard the S.S. "Sweepstakes" and in negligently permitting the said flour to be contacted with salt water while aboard the vessel. That there was no excuse for such negligence, nor were there any conditions or circumstances excusing or relieving the respondent from liability to the libellant for damage caused to said flour by reason of such negligence.

VIII.

That a total of 3,087 bags of the aforesaid flour were extensively damaged due to wetting caused by salt water contact with the flour while aboard the S.S. "Sweepstakes" in the custody of the respondent carrier. That upon the basis of laboratory analysis and inspection by a competent chemist and by an experienced marine surveyor the damage to the 3,087 bags of flour is determined to be 35% per bag of its sound market value at destination. That there was no salvage obtained or obtainable from that portion of flour which was damaged as aforesaid.

IX.

That the sound market value of each 50-kilogram bag of flour at the port of Rio de Janeiro at the time of arrival and delivery of this shipment, according to the testimony of a qualified witness, was 137 cruzeiros, Brazilian funds. That libellant in its answers to interrogatories prior to trial had stated

the sound market value of each such bag of flour at the aforesaid time and place as 126 cruzeiros, Brazilian funds, and libelant has agreed to waive its right to recovery of any sum in excess of the sound market value so stated in its answers to interrogatories. That at the prevailing rate of exchange the sound market value of each 50-kilogram bag of flour was and is \$6.27, U. S. funds. That 35% depreciation to 3,087 bags of the aforesaid shipment of flour as of time of arrival at destination was and is the sum of \$6,774.42, U. S. funds. That the sum of \$6,774.42 represents the difference between the value of the said flour had it arrived at the port of destination in good order and condition and the value of said shipment of flour as it arrived, was discharged and delivered in a damaged condition at the port of destination, all due to respondent's fault and negligence as hereinabove stated.

X.

That after discharge of said flour from the steamship "Sweepstakes" at the port of Rio de Janeiro and delivery to the consignee, due and timely notice of the damage sustained to the shipment of flour was given by the libelant to the agent for respondent carrier at Rio de Janeiro by letter of March 2, 1946. That by such letter respondent and its agent at Rio de Janeiro had a full and complete opportunity to examine, test and analyze the damaged portions of the above shipment of flour after receipt of the aforesaid notice of damage from the libelant.

XI.

That libelant has fully performed all the conditions of the contract of carriage.

XII.

That this proceeding is within the admiralty and maritime jurisdiction of the United States and within the jurisdiction of this court sitting in admiralty.

To the foregoing respondent excepts and its exception is allowed.

Done in open court this 14th day of November, 1949.

/s/ JOHN C. BOWEN,
U. S. District Judge.

Based upon the foregoing Findings of Fact the court now makes the following

Conclusions of Law

I.

That respondent was negligent in the stowage, care and custody of the cargo while in transit from the port of New York to Rio de Janeiro and that said negligence of the respondent was the sole and proximate cause of the 35% depreciation in value of the 3,087 bags of flour in the shipment and damage to the libelant herein.

II.

That libelant is entitled to a decree herein against

respondent in the sum of \$6,774.42, together with interest thereon at 4% per annum from November 14, 1949, and for its costs herein to be taxed.

To the foregoing respondent excepts and its exception is allowed.

Done in open court this 14th day of November, 1949.

/s/ JOHN C. BOWEN,
U. S. District Judge.

Presented by:

/s/ CHARLES B. HOWARD,
Of Proctors for Libelant.

Approved as to form:

J. CHARLES DENNIS,
U. S. Attorney.

BOGLE, BOGLE & GATES,
Proctors for Respondent.

Receipt of copy acknowledged.

[Endorsed]: Filed November 14, 1949.

In the United States District Court for the Western
District of Washington, Northern Division

In Admiralty No. 15036

CIA. LUZ STEARICA, a Corporation,
Libelant,

vs.

UNITED STATES OF AMERICA,
Respondent.

DECREE

The above-entitled cause having come on regularly for trial in the above-entitled court before the undersigned judge thereof on October 28, 1949, and having been continued from time to time and concluded on November 5, 1949; libelant appearing by Charles B. Howard of its proctors, and respondent appearing by Claude E. Wakefield and Bayard Crutcher of its proctors; and the court having duly considered the evidence and exhibits submitted by the respective parties and the arguments of counsel submitted for the respective parties, together with trial briefs and memoranda of authorities filed by each of the parties, and being fully advised in the premises and having orally announced its decision thereon, and having entered herein its Findings of Fact and Conclusions of Law;

Now, therefore, in accordance therewith, it is Ordered, Adjudged and Decreed that libelant have and recover herein from respondent the sum of

\$6,774.42, together with interest thereon at 4% per annum from November 14, 1949, and costs herein taxed in the sum of \$239.63.

To the foregoing respondent excepts and its exception is allowed.

/s/ JOHN C. BOWEN,
U. S. District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed Nov. 14, 1949.

[Title of District Court and Cause.]

PETITION FOR APPEAL

To the Honorable Judges of the Above-Entitled Court:

Respondent, United States of America, in the above-entitled cause, by and through J. Charles Dennis, United States Attorney for the Western District of Washington, and Bogle, Bogle & Gates and Claude E. Wakefield and M. Bayard Crutcher, of Counsel to the said United States Attorney, being aggrieved by that certain final order, to wit, the judgment and decree filed and entered in the above cause on November 14, 1949, hereby claims an appeal therefrom and from the whole thereof, to the United States Court of Appeals for the Ninth Circuit, and prays that such appeal be allowed forthwith.

Dated this 13th day of February, 1950.

J. CHARLES DENNIS,
United States Attorney.

BOGLE, BOGLE & GATES,
CLAUDE E. WAKEFIELD,
/s/ M. BAYARD CRUTCHER,
Of Counsel.

Receipt of copy acknowledged.

[Endorsed]: Filed February 13, 1950.

[Title of District Court and Cause.]

ORDER GRANTING PETITION FOR APPEAL

The above-entitled cause having duly and regularly come on for hearing before the above-entitled court, the undersigned Judge presiding, upon petition for appeal of respondent United States of America duly presented to this court, together with the said respondent's assignment of errors heretofore filed with the Clerk of this court, and the court having considered the same; now, therefore,

It Is Hereby Ordered that an appeal to the United States Court of Appeals for the Ninth Circuit from the judgment and decree heretofore entered and filed on the 14th day of November, 1949, in the above-entitled cause, be and the same is hereby allowed.

It Is Further Ordered that the respondent United

States of America is not required to file cost and supersedeas bond on appeal, and that stay of execution is hereby entered and granted.

Done In Open Court this 13th day of February, 1950.

/s/ JOHN C. BOWEN,
United States District Judge.

Presented by:

/s/ M. BAYARD CRUTCHER,
Of Counsel to the
United States Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed Feb. 13, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the United States of America, respondent above named, hereby appeals to the Court of Appeals for the Ninth Circuit from each and every part of the final judgment and decree entered in this cause on November 14, 1949, as more fully set forth in said respondent's assignments of error filed herewith.

Dated this 13th day of February, 1950.

/s/ J. CHARLES DENNIS,
United States Attorney.

BOGLE, BOGLE & GATES,
/s/ CLAUDE E. WAKEFIELD,
/s/ M. BAYARD CRUTCHER,
Of Counsel.

Receipt of copy acknowledged.

[Endorsed]: Filed February 13, 1950.

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS BY RESPOND-
ENT UNITED STATES OF AMERICA

Respondent, United States of America, hereby assigns error in the trial and proceedings before the Court and in the Findings of Fact and Conclusions of Law and Judgment and Decree entered and filed on the 14th day of November, 1949, as follows:

1. That the Court erred in finding that the libelant's shipment of flour was delivered by respondent to libelant at Rio de Janeiro in a damaged condition. (Findings of Fact 6, 7 and 8.)

2. That the Court erred in finding that said shipment of flour was damaged by sea water at the time of discharge from the vessel and when delivered to libelant. (Findings of Fact 7 and 8.)

3. That the Court erred in finding that any damage to said flour by sea water or damage from any other cause was proximately caused by respondent's negligence or improper care of said cargo, or was caused by respondent at all. (Findings of Fact 7 and 8.)

4. That the Court erred in finding that there was a competent or sufficient chemical analysis of said damaged flour as a basis for a determination of salt water contamination. (Findings of Fact 8.)

5. That the Court erred in finding that there was a competent or sufficient survey, testing, sampling

or analysis of damage to said flour on the basis of chemical analysis, testing or sampling to establish a loss or damage of 35% of the sound market value of the contents of each bag, or in finding that there was any competent or sufficient evidence of any other percentage, measure or extent of loss or damage whatsoever. (Findings of Fact 8 and 9.)

6. That the Court erred in finding that there was no salvage obtained or obtainable from the damaged flour. (Finding of Fact 8.)

7. That the Court erred in finding that the sound market value of flour at the port of Rio de Janeiro at the time of delivery to libelant was 137 Cruzeiros or 126 Cruzeiros, or in finding that there was any competent or sufficient evidence of sound market value of said flour. (Finding of Fact 9.)

8. That the Court erred in finding that the difference between the sound market value and the value of the alleged damaged flour was \$6,774.42 or any sum whatsoever. (Finding of Fact 9.)

9. That the Court erred in finding that libelant gave respondent sufficient notice of damage or claim and in finding that respondent was afforded sufficient or any opportunity to survey, test, sample or analyze the alleged damaged flour. (Finding of Fact 10.)

10. That the Court erred in rejecting respondent's evidence of condition and seaworthiness of respondent's vessel "Sweepstakes" as to prior and subsequent voyages of the vessel, and north-bound

on the same voyage in respect of showing no sea water damage or other damage to any cargo on such voyages; that there were no leaks and no repairs were made to the vessel, all as bearing upon the issue of the possibility of sea water damage on the voyage in question.

That libelant objected to said testimony as follows:

“Mr. Howard: At this point I object to that question. It is a question directed to the Master of this vessel interrogating him as to claims for damage to sugar carried on a previous voyage. I submit whether or not they had any claims for damage on a previous voyage had no bearing on the claim made by libelant in the present case. Before Your Honor rules on that I would like an opportunity to cite authorities I have on that question.” (Typewritten transcript, p. 111.)

“Mr. Howard: I object to this question and the next three questions following on the same grounds as stated this morning, that is, that this now relates to a subsequent voyage and not the voyage in question. I submit that any evidence of cargo or damage, if any, that may have been sustained to cargo on a subsequent voyage would not be admissible for the same reason that evidence of damage on a prior voyage would not be admissible.” (Typewritten transcript, p. 140.)

That the court sustained said objections and excluded said evidence and all subsequently offered evidence on the same issue. (Typewritten transcript, pp. 113, 115, 116, 118, 119, 120, 154.)

That respondent made due and proper offers of proof in substance as follows:

That on the preceding voyages of this vessel to European and South American ports and return to New York and upon return to New York on the northbound voyage in question, and on the subsequent voyage to South America, there was no evidence of leakage of the hull or decks or at all, or of any water, sea water or moisture damage to cargo from any source or cause. (Typewritten transcript, pp. 114, 116, 118, 120, 154.)

11. That the Court erred in making and entering Conclusions of Law 1 and 2 in that there was no proof or sufficient proof——

(a) That respondent was responsible or liable for any damage;

(b) That respondent was negligent in any respect;

(c) That the damage was 35% or any other percentage or measure of damage;

(d) That the sound value of the flour, less damaged value was \$6,774.42 or any other ascertainable sum;

(e) That the evidence was insufficient to establish respondent's liability at all and was insufficient to establish any basis of damage as to the extent thereof or the value thereof.

12. That the Court erred in entering a Final Decree on November 14, 1949, in favor of libelant in the sum of \$6,774.42 plus interest and costs, or in any other sum, in that under the evidence before the Court and the evidence improperly excluded by the Court, libelant failed to prove its case and Decree should have been entered in favor of respondent dismissing the libel and awarding respondent its costs.

/s/ J. CHARLES DENNIS,
United States Attorney.

BOGLE, BOGLE & GATES,
/s/ CLAUDE E. WAKEFIELD,
/s/ M. BAYARD CRUTCHER,
Of Counsel.

Receipt of copy acknowledged.

[Endorsed]: Filed February 13, 1950.

[Title of District Court and Cause.]

CITATION ON APPEAL

The President of the United States to the Above-Named Libelant, Cia Luz Stearica, a Corporation,

Greetings:

You are hereby notified that in that certain cause in Admiralty in the United States District Court for the Western District of Washington, Northern Division, as entitled above, wherein Cia Luz Stear-

ica, a corporation, is libelant, and the United States of America is respondent, an appeal has been allowed by order of this court to the United States Court of Appeals for the Ninth Circuit, upon the petition of the respondent therefor.

You are hereby cited and admonished to be and appear in the United States Court of Appeals for the Ninth Circuit in San Francisco, in the State of California, within forty (40) days from the date of this citation pursuant to an appeal allowed in the above-entitled cause on the 13th day of February, 1950, to show cause, if any there be, why the final decree as entered in the above-entitled cause, upon such appeal above mentioned, should not be corrected and speedy justice should not be done in that behalf.

Witness the Honorable John C. Bowen, Judge of the United States District Court for the Western District of Washington, this 13th day of February, 1950.

[Seal] /s/ JOHN C. BOWEN,
United States District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed Feb. 13, 1950.

In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 15036

CIA. LUZ STEARICA, a Corporation,
Libelant,

vs.

UNITED STATES OF AMERICA,
Respondent.

Before: The Honorable John C. Bowen,
District Judge.

TRANSCRIPT OF PROCEEDINGS
AT TRIAL

October 28, 1949

Proctors:

MERRITT, SUMMERS & BUCEY and
CHARLES B. HOWARD,

For Libelant.

J. CHARLES DENNIS,
United States Attorney, for Respondent.

BOGLE, BOGLE & GATES,
CLAUDE E. WAKEFIELD and
M. BAYARD CRUTCHER,
Of Counsel.

Whereupon, opening statements having been made by counsel for libelant and counsel for respondent, the following proceedings were had and done, to wit:

The Court: The Court will now hear the first witness.

Mr. Howard: At this time, if the Court please, pursuant to the stipulation with counsel for respondent I have already referred to, dated September 8, 1948, I would like to have marked the two bills of lading.

(Bills of lading marked Libelant's Exhibit 1 for Identification.)

Mr. Howard: I offer those two bills of lading in evidence now, pursuant to that stipulation.

The Court: Is there any objection? [2*]

Mr. Howard: If the Court please, I can read the stipulation while counsel is examining the bills of lading.

After giving the title of the case, "It is hereby Stipulated by and between Merritt, Summers & Bucey, proctors for libelant, and Bogle, Bogle & Gates, of proctors for respondent, that executed copies of Bills of Lading No. 37 and No. 74 on the S.S. "Sweepstakes" dated January 31, 1948, and containing endorsements of the National City Bank of New York, International Milling Co., and Companhia Luz Stearica on each of said copies, may be introduced in evidence as exhibits by libelant at time of trial of the above cause, without further identification or necessity of further proof as to

* Page numbering appearing at bottom of page of original Reporter's Transcript.

authenticity. It is further stipulated that the admission of said executed copies of Bills of Lading No. 37 and No. 74 will constitute sufficient proof of the libelant's ownership of the shipments of flour covered by each of said bills of lading and that respondent waives the requirement of any further proof by libelant to establish libelant's legal title to the shipments of flour and capacity or right to maintain this action against respondent for alleged damages to said flour shipments.

"Dated at Seattle, Washington, this 8th day of September, 1948."

It is signed by myself, Merritt, Summers & Bucey, and by Mr. Wakefield, Bogle, Bogle & Gates.

Mr. Wakefield: There is no objection to Libelant's Exhibit 1, Your Honor.

The Court: It is now admitted.

(Libelant's Exhibit 1 received in evidence.)

Mr. Howard: I would like to call Your Honor's attention at this time to the fact that one of those bills of lading covers 6000 50 kilo bags of flour, and the other bill of lading covers 4500 50 kilo bags of the same brand of flour. [4]

* * *

Mr. Howard: Libelant next calls on the deposition of Anthony Parsons, portions of which we would like to read.

Mr. Wakefield: If the Court please, before the deposition is read I would like to state for the record that this witness is a witness called by the respondent and not the libelant.

The Court: Do you adopt the testimony and call the witness whose deposition was taken as your witness?

Mr. Howard: Yes, Your Honor, insofar as that portion of the deposition which I desire to read.

Mr. Wakefield: I object to reading any portions. If he is going to produce the deposition, I think he should read the whole deposition.

The Court: It would not hurt if you advised the Court of the authorities touching your respective contentions. I imagine you have a lot of authorities to support your position, do you not?

Mr. Howard: I can advise Your Honor of my position. 26 C.J.S. on depositions, Sec. 89: "A deposition which [5] has been properly taken and filed and which contains relevant and competent evidence may, in the discretion of the court, be admitted in evidence at any stage of the trial."

Sec. 91: "As a general rule a party who introduces a deposition in evidence need not read all of it, at least where it was taken by his adversary; and the opposing party may introduce all or any part of the remainder. * * * Nearly all the authorities agree that a party using a deposition taken by his adversary may introduce only such part of it as relates to the issue on which it is offered, and it has been held that, by so doing, he does not make the deponent his own witness. The taker may then put in evidence any part not already introduced."

In support of those statements in C.J.S., I can cite to Your Honor a case in the Circuit Court for

the Third Circuit, a 1924 case, 2 F. (2) 322, and an Eighth Circuit case, 169 F. 593.

From the Third Circuit Court opinion: “* * * whether the plaintiff may use a deposition taken by his adversary and introduce only such parts of it as he may desire, leaving to the defendants, on whose behalf the deposition was taken, the right to put the remainder in evidence,” was a question raised and decided. That [6] was decided in favor of the plaintiff on that point, and that case was then cited in the later case.

The statement I have on that is as follows: “In the course of the trial, the defendant was permitted to read in evidence a portion of each of four depositions taken by the plaintiff, but not used by her, the plaintiff objecting in each instance that it was not admissible to read a part only of a deposition, and that the portion read did not include all bearing upon the same subject. * * * There is some diversity of opinion among the courts upon this question of practice, but the prevailing and better opinion is that there is no sound objection to the reading of a part only of a deposition, if what is read does not consist of mere fragmentary excerpts, a correct appreciation of which depends upon the context, and the opposite party be left at liberty to read what is omitted.”

The Court: I will hear opposing counsel.

Mr. Wakefield: I don't find any objection to counsel's law, but the fact is that what he read from C.J.S. was to the effect that he may use this deposition as relating to a specific issue. He has not

specified what issue he is going to prove, or what issue the testimony he is now seeking to elicit from this deposition—what the purpose of it is. By reading [7] portions, as this case he last mentioned states, by reading fragmentary portions he will destroy the effect of the whole deposition. I submit we should not have our deposition and our proof jeopardized or lessened in force by counsel going through and picking out fragmentary portions.

The Court: If it is fragmentary, it will not come within the rules, is that your position?

Mr. Howard: That is the way one court has so described it. I advise the Court that it is not my intention to read fragmentary portions of the deposition.

The Court: Are you willing to state upon what issues you offer the deposition as bearing?

Mr. Howard: Yes, Your Honor. I am taking this in chronological order, and the testimony I propose to read would be on the question of the delivery of the cargo to the vessel in good condition at the Port of New York.

The Court: You may do that. Counsel opposing may have the right to read the remainder of the deposition not read by libelant's counsel without making the deponent the witness of respondent.

DEPOSITION OF ANTHONY PARSONS

(Mr. Lord appearing for respondent, Mr. Prem appearing for libelant.)

Direct Examination

“By Mr. Lord: [8]

Q. How long have you been going to sea, Mr. Parsons? A. Since 1937.

Q. What papers do you hold?

A. Master's license.

Q. You are now sailing on a vessel of Moore-McCormack?

A. Yes, chief mate on the Mormacoak.

Q. When did you obtain your chief mate's papers? A. About 1943.

Q. And you sailed continuously from that time as chief mate?

A. Yes, after obtaining my sailing license as chief mate.

Q. Were you chief mate on the Sweepstakes on a voyage from New York to South American ports in January, 1946? A. Yes.

Q. Do you recall when you joined the Sweepstakes?

A. I joined her about January 31st, I believe.

Q. Where was she then?

A. She was over at Pier 32.

Q. Was she then loading cargo?

A. Loading cargo, yes.

* * *

(Deposition of Anthony Parsons.)

Q. Did you know that wheat was loaded into the Sweepstakes on this voyage?

A. Well, I recall its being loaded while I was——[9]

Mr. Prem: This is flour.

Mr. Lord: Wheat flour.

A. (Continuing): Flour was loaded at Pier 32 while I was on board the ship.

Q. Do you recall where the flour was stowed in the vessel?

A. According to the cargo plan it was stowed in Nos. 1, 2, 3 and 4 in the tween decks, and I believe lower tween deck in No. 4. May I see the cargo plan?

(Witness is handed the cargo plan.)

Q. (Continuing, referring to plan): Yes, that is correct. That is top stowage or special stowage for easy discharge upon arrival at Rio.

Q. Have you made any investigation to determine whether or not libellant's shipments, which were marked "C L S" were loaded before or after you joined the Sweepstakes?

A. Well, I checked the hatch data and I see that some cargo, a lot of it had been loaded prior to my joining. The majority was loaded after.

Q. You mean by a lot a single lot—is that what I understand? A. A lot of it, a part of it.

Q. Do you recall the approximate number of bags that were loaded before you joined the Sweepstakes?

(Deposition of Anthony Parsons.)

A. Not unless I looked at the hatch tallies, I don't [10] recall the figures.

Q. I show you a number of slips of paper and ask you to identify these for us.

A. They are the hatch tallies of the Sweepstakes for wheat flour.

Q. Do those hatch tallies give the dates when the various lots of cargo were loaded on board the vessel?

A. Yes, they have the date on the top of the page.

Q. Will you tell us if you can from examining those hatch tallies what, if any, flour was loaded on the Sweepstakes prior to January 31, 1946?

A. On the 28th, 1965 bags loaded aboard marked "C L S."

Q. Was the balance of the bags loaded after you joined the vessel?

A. They were loaded after, yes.

Q. When you came aboard the Sweepstakes, chief, what, if any, inspection did you make of the vessel?

A. Well, it is customary when joining your vessel to inspect the whole vessel as thoroughly as possible and since she was loading at the time I inspected the cargo gear and hatches to see how the loading was progressing.

Q. Did you have an opportunity to look into the hatches where the wheat flour was being loaded?

A. Yes, I inspected all the hatches, went down in all the hatches. [11]

(Deposition of Anthony Parsons.)

Q. What was the result of such inspections?

A. As far as I can recall everything appeared in order, ample dunnage was laid and the cargo seemed to be coming aboard in good condition and being properly stowed at the time.

Q. Did you find any moisture or dampness or water in the hatches at that time?

A. No, there was no indication of that.

* * *

Q. Now, chief, did you undertake any detailed inspection of the bags of wheat flour as they came aboard?

A. No, we don't check in detail, we just watch them coming aboard, see if they appear all right, no torn bags, and the outward appearance is good.

Q. Then you did not observe any external obvious damage to this wheat flour?

A. No, it seemed to come aboard in good condition. We didn't check it any further.

Q. Did you lift or feel any bags of wheat at this time? A. No."

Mr. Howard: I would like to have the hatch tallies, the dock receipts which were referred to in this testimony marked for identification as exhibits for the libelant. [12]

Mr. Wakefield: I have here, Your Honor, and will hand to the bailiff nine sheets marked Respondent's Exhibit C for Identification, bearing date of January 5, 1949, as the date of the deposition.

The Court: Do you ask the clerk to mark these?

Mr. Howard: Yes, Your Honor.

(Hatch tallies marked Libelant's Exhibit 2 for Identification.)

The Court: Will you repeat the name given them by counsel offering them?

Mr. Howard: Hatch tallies. I offer those in evidence, Your Honor.

Mr. Wakefield: No objection.

The Court: That exhibit is now admitted, consisting of several sheets of such tallies.

(Libelant's Exhibit 2 received in evidence.)

Mr. Howard: That is all that the libelant will read from the Parsons deposition.

The next witness to be called by deposition, if the Court please, is Izaias Luiz.

The Court: All depositions received by the clerk in this case are now published.

DEPOSITION OF IZAIAS LUIZ

Direct Examination

"No. 1. Please state your name, age, nationality, [13] and where you now live and reside.

First—To the First Interrogatory he says:

Izaias Luiz, 28 years, Brazilian, Rua Marcos Sete, No. 2, Santissima, Rio de Janeiro, Federal District, Brazil.

No. 2. State by whom, where and in what capacity you were employed in February and March, 1946.

(Deposition of Izaias Luiz.)

Second—To the Second Interrogatory he says:

I was and am employed by the Port Administration, Rio de Janeiro, as checker.

No. 3. State for how long you were employed in the above capacity; also, whether you are still employed by the same concern.

Third—To the Third Interrogatory he says:

In 1946 I had been employed for two years and am still employed in the same capacity at present.

No. 4. State the duties of such employment and what qualifications you have for such position by previous experience, i.e., duties of employment and what experience you have had in performing your duties.

Fourth—To the Fourth Interrogatory he says:

In cases when shipments go into the customshouse I verify all damage and record it. In cases where shipments are delivered directly from ship to rail car I verify only the quantity and make no examination of the condition of the goods. I have worked in the port fourteen years, first as a [14] workman unloading and loading ships. I became a checker by taking a competitive examination.

No. 5. Did you, in your capacity as truckman remove or supervise the removal of a shipment of 10,500 bags of flour from dockside ex steamer "Sweepstakes" at Rio de Janeiro on or shortly after February 20, 1946?

Fifth—To the Fifth Interrogatory he says:

I played a very small part in unloading this ship-

(Deposition of Izaias Luiz.)

ment. I supervised the removal of only part of a shipment, say a carload on the entire shipment.

No. 6. If your answer to the preceding interrogatory is in the affirmative, please state when the flour was removed from the dock.

Sixth—To the Sixth Interrogatory he says:

I don't remember exactly. The cars probably left the dock the same day they were loaded.

No. 7. Were open or covered wagons, trucks or railroad cars used in removing the above-described flour shipments?

Seventh—To the Seventh Interrogatory he says:

Open railroad cars were used and covered with canvas as soon as loaded.

No. 8. If open wagons, trucks or cars were used, please state what, if any, coverings or tarpaulins were spread over the contents and fully describe such coverings [15] as to kind, size, method of securing, and whether they were in good condition.

Eighth—To the Eighth Interrogatory he says:

The canvas was in good condition and was well secured with rope tied under the car. No rain could possibly damage the goods covered.

No. 9. Was each wagon, truck or carload securely covered with a tarpaulin?

Ninth—To the Ninth Interrogatory he says:

I saw only one wagon."

Mr. Wakefield: If the Court please, at this time I would like to move to strike the answer to the eighth interrogatory on the ground that the witness'

(Deposition of Izaias Luiz.)

answer to the ninth interrogatory clearly shows that he is unable to answer any interrogatory with respect to the condition or how the rope was tied of any car except one, because he said he saw only one wagon. I therefore submit that the eighth answer is improper.

The Court: The motion will be denied. The Court will consider it as going to the weight of the answer.

“No. 10. To what destination were the loads of flour delivered?

Tenth—To the Tenth Interrogatory he says: [16]

It was sent directly to the mill. I don't remember which mill.

No. 11. How long were such wagons, trucks or cars en route, and was there any delay involved in arrival at destination?

Eleventh—To the Eleventh Interrogatory he says:

I don't know.

No. 12. State, if you recall, whether there was any rainfall in Rio de Janeiro on the dates in 1946 when the shipment of flour described above was transported from dockside ex steamer “Sweepstakes” to another destination.

Twelfth—To the Twelfth Interrogatory he says:

I don't think it rained. No unloading is done during rain and it is doubtful if any car remained on the docks more than two hours after loading.

No. 13. State, if you know, whether said shipments of flour became dampened by penetration of

(Deposition of Izaías Luiz.)

rainwater during the period in 1946 while in transit from dockside to another destination.

Thirteenth—To the Thirteenth Interrogatory he says:

I don't know.

No. 14. Did you examine the contents of the various loads of flour when discharged from the steamer "Sweepstakes" into wagons, trucks or cars in February, 1946?

Fourteenth—To the Fourteenth Interrogatory he says: [17]

No.

* * *

No. 19. Describe the warehouse, building or area to which the shipments of flour were transported from dockside to consignee's premises.

Nineteenth—To the Nineteenth Interrogatory he says:

I don't follow the shipment to the mill. All of the mills are close to the docks.

No. 20. Was the warehouse, building or area referred to in Interrogatory No. 19 sheltered from the elements, particularly rainfall, and if so, explain fully.

Twentieth—To the Twentieth Interrogatory he says:

I have never seen these areas.

No. 21. To the best of your knowledge were the above-mentioned shipments of flour exposed to rainfall at any time after discharge from the steamer

(Deposition of Izaias Luiz.)

“Sweepstakes” up to time of delivery at the premises of Cia. Luz Stearica and explain fully.

Twenty-first—To the Twenty-first Interrogatory he says:

I don't think any part of the shipment was exposed to rain.

No. 22. Do you expect to be in the State of Washington, U.S.A., at any time during the next six months?

Twenty-second—To the Twenty-second Interrogatory he says:

“No.” [18]

Cross-Interrogatories

No. 1. Were you present and did you observe the sacks of flour as they were discharged from the ship and placed in the wagons, trucks or cars?

First—To the First Cross-Interrogatory he says:

I observed only a small part of the cargo unloaded.

No. 2. If your answer to the preceding interrogatory is that you did observe the discharge of the flour from the ship, state fully what your duties were at that time; also whether you made any inspection of the flour as it was being discharged or after it was loaded into the cars.

Second—To the Second Cross-Interrogatory he says:

I verified only the number of sacks; I did not inspect the flour.

(Deposition of Izaias Luiz.)

No. 4. If you have testified that the cars were covered with tarpaulins or other covering, state when this was done and where the cars were located at the time it was done.

Fourth—To the Fourth Cross-Interrogatory he says:

The cars were alongside the ship and were covered as soon as they were loaded.

No. 5. Give the daily movement or location of all of these cars from the time they were first loaded about February 20 until they arrived at the consignee's warehouse [19] and were discharged.

Fifth—To the Fifth Cross-Interrogatory he says:

I don't know.

No. 6. How far is it from the place where the cars were loaded alongside the vessel to the place where the cars were unloaded at the consignee's warehouse.

Sixth—To the Sixth Cross-Interrogatory he says:

The most distant mill is the "Luz" mill which is about 1800 meters from the point of unloading.

No. 7. Explain the reason for or causes of the lapse of time between loading the cars alongside the vessel and arrival of the cars at consignee's warehouse some ten or twelve days later.

Seventh—To the Seventh Cross-Interrogatory he says:

I don't know.

No. 8. Who arranged for or hired the cars in question?

(Deposition of Izaias Luiz.)

Eighth—To the Eighth Cross-Interrogatory he says:

The cars were probably those belonging to the Port Administration and hired by the company. I don't know for certain.

No. 9. Was any inspection made of the bags of flour at the time they were being discharged from the cars at the consignee's warehouse, and if so, state who made the inspection and the result thereof as to the condition of the [20] bags of flour.

Ninth—To the Ninth Cross-Interrogatory he says:

I don't know. Probably the bags were inspected.

No. 10. Please describe the character of rainfall usually encountered in Rio de Janeiro during February and March, particularly as to whether it is a light, steady rain or a heavy rain for a short period of time, and at what hour or hours of the day or night it is most likely to rain.

Tenth—To the Tenth Cross-Interrogatory he says:

This no one can say.

No. 11. Did you keep any record of the rainfall during the period the cars in question were loaded with flour?

Eleventh—To the Eleventh Cross-Interrogatory he says:

I made no record.

No. 12. If you have answered that the cars were covered with tarpaulins or other covering after being loaded, explain fully why this was done.

Twelfth—To the Twelfth Cross-Interrogatory he says:

To avoid wetting in case of rain.

(Deposition of Izaías Luiz.)

No. 13. Explain in detail the size, construction and general characteristics of the cars, wagons or trucks which carried the flour.

Thirteenth—To the Thirteenth Cross-Interrogatory he says:

The usual open railroad car, box-shaped, weighing from 30 to 45 tons, holding 600 to 800 bags. [21]

No. 14. If you have answered that you did examine the bags of flour when discharged from the ship, please state the purpose of such examination by you, whether the Brazilian Customs or anyone else made an examination at the same time, and to whom you made a report as to the results of such examination.

Fourteenth—To the Fourteenth Cross-Interrogatory he says:

No one examined the flour at the time of unloading.

* * *

No. 17. Describe fully how the sacks of flour were discharged from the cars, such as——

(a) Where the cars were placed, whether inside or outside the warehouse.

(b) How the sacks were discharged and what was done with them immediately upon being discharged.

(c) How the sacks were piled in the warehouse.

(d) The type of floor in the warehouse and whether dunnage was used under the sacks, or otherwise.

(Deposition of Izaias Luiz.)

Seventeenth—To the Seventeenth Cross-Interrogatory he says:

I wasn't there.

* * *

No. 19. On what date and at what hour did the cars arrive at consignee's warehouse.

Nineteenth—To the Nineteenth Cross-Interrogatory he says:

I don't know. [22]

No. 20. How long did it take to unload the cars and on what date and at what hour was the unloading completed.

Twentieth—To the Twentieth Cross-Interrogatory he says:

I don't know."

Mr. Howard: That concludes the deposition of this witness, Your Honor. We offer that in evidence.

The Court: Each of these depositions and parts of such as have been read is now received in evidence as part of the libelants' case in chief.

Court will be in recess ten minutes.

(Recess.)

The Court: You may resume the taking of testimony and call libelants' next witness.

(Copy of letter 3-2-46 and letter 3-9-46 marked Libelant's Exhibit 3 for Identification.)

The Court: Is this proffered exhibit in connection with any testimony that is being taken, or is it pursuant to stipulation?

Mr. Howard: It will be pursuant to stipulation, Your Honor.

The Court: Does it have a name that each side may agree upon which you may state for our future reference?

Mr. Howard: For identification, I can identify Libelant's Exhibit 3 as a copy of a letter from the [23] libelant corporation to the agent for the respondent at Rio de Janeiro, and the date of the letter is March 2, 1946.

The Court: Do you offer it?

Mr. Howard: I offer that now pursuant to oral stipulation.

Mr. Wakefield: I have no objection to it, but I would like to suggest that the other letter he has, which is a reply to that letter, be attached and both made the same exhibit.

The Court: Can it be attached at the bottom?

Mr. Wakefield: Yes. The top one is the original letter and the bottom one the answer.

Mr. Howard: The other letter counsel has referred to is dated March 9, 1946, from Moore-McCormack, Inc., at Rio de Janeiro, to the libelant corporation in the same city. To each of the copies is attached a translation from Portuguese into English. I offer both of those, now identified as Libelant's Exhibit 3.

The Court: Libelant's Exhibit 3 is admitted.

(Libelant's Exhibit 3 received in evidence.)

Mr. Howard: The first of these letters I am reading, if the Court please, is the translation from Portuguese into English of the letter of March 2, 1949, from Companhia Luz Stearica, Sec. Moinho da Luz, Rio de Janeiro, Brazil, to Moore-McCormack, S. A., at a street address in Rio de Janeiro.

“Gentlemen: Ref.: 10,500 sacks with 252,000 kilos of flour shipped in New York on the steamship “Sweepstakes,” corresponding to bills of lading dated 1/31/36. Having noted a certain number of torn sacks with loss of contents, and as many more wet, on the unloading of the flour under reference, we are advising you that we hold the steamer’s owners responsible, as transporters, for the averages above mentioned.

“There being nothing further, we are, Yours respectfully, Companhia Luz Stearica Sec. Moinho da Luz” by a director.

The Court: On what issue does that bear?

Mr. Howard: It bears on the issue of any notice [27] given to the respondent or agents of respondent of damage discovered to this shipment upon arrival at Rio de Janeiro, and upon the remarks that counsel made in his opening statement on behalf of respondent as to there being no opportunity for the respondent or its representatives to inspect the shipment or to participate in any survey that was made or any tests that were made as to the damage found in the shipment.

The second letter is on Moore-McCormack’s letterhead, at Rio de Janeiro, dated March 9, 1946, to

Messrs. Moinho da Luz, Cia Luz Stearica, at Rio de Janeiro.

“Ref: SS Sweepstakes, V-12S 10,500 Sacks of flour. Gentlemen: In reply to your favor of the 2nd inst., we must inform you that according to the registers of defects and averages of the Wharf Warehouse, the packages above were unloaded in perfect condition, the which exempts us from any responsibility.

“There being nothing further, we are, Yours sincerely, Moore-McCormack (Navagacao) S/A., Representative of the Moore-McCormack Lines, Inc., agent of the “War Shipping Administration” of the U.S.A., By: A. M. Caswell, Dept. Defects and Averages.”

The Court: In that connection, will you state, if you think a statement could be agreeable to the opposing side, what the discharge date of this shipment was? [28]

Mr. Howard: Counsel has stated, and as I think will be borne out from the testimony, without checking it immediately, discharge commenced on February 21st.

The Court: Of 1946?

Mr. Howard: 1946. As to the completion date of discharge, I am not certain. I believe counsel mentioned the 25th or 26th of February.

Mr. Wakefield: The deposition will show it was completed at 10:10 a.m., February 25th.

The Court: Commenced on February 21st and completed at 10:10 a.m., February 25, 1946?

Mr. Wakefield: Yes, Your Honor.

Mr. Howard: Libelant next offers the deposition of Francisco Ramos. By stipulation, the testimony of Mr. Ramos was taken in place of the witness designated on the interrogatories as Mr. C. S. Botelho.

The Court: Then you are reading the questions addressed to Botelho?

Mr. Howard: Yes, Your Honor.

The Court: Those are answered by Mr. Ramos?

Mr. Howard: Yes, Your Honor. There is a stipulation attached to the original covering that substitution.

The Court: You may proceed. [29]

DEPOSITION OF FRANCISCO RAMOS

Direct Examination

"No. 1. Please state your name, age, nationality, and where you now live and reside."

First—To the First Interrogatory he says:

"Francisco Ramos, age 27, Brazilian nationality, Rua Amiris, No. 50, apartment 104, Rio de Janeiro, Brazil.

No. 2. State by whom, where and in what capacity you were employed in February and March, 1946."

Second—To the Second Interrogatory he says:

Companhia Imobiliaria Financeira Americana S. A. I was employed as a surveyor.

No. 3. State for how long you were employed in

(Deposition of Francisco Ramos)

the above capacity; also, whether you are still employed by the same concern.

Third—To the Third Interrogatory he says:

From December, 1939, to the present with the same company and in the same capacity.

No. 4. State the duties of such employment and what qualifications you have for such position by education, training or previous experience.

Fourth—To the Fourth Interrogatory he says:

When merchandise insured by our company arrives damaged, I survey it. My experience is practical. I have had no special training.

No. 5. If in answer to the last three preceding interrogatories you state that you were, in February and [30] March, 1946, employed by Companhia Imobiliaria Financeira Americana S. A. at Rio de Janeiro, Brazil, as a marine surveyor, state whether or not, as part of your duties, you then made an inspection, or inspections, for such concern of a certain shipment of wheat flour in sacks consigned to Cia. Luz Stearica which was discharged from the steamer "Sweepstakes" after the arrival of the vessel at Rio de Janeiro on or about February 20, 1946.

Fifth—To the Fifth Interrogatory he says:

Yes.

No. 6. If you have answered the last preceding interrogatory in the affirmative, state to whom said shipment of wheat flour was consigned, and, if you know, the quantity of flour in the shipment inspected.

(Deposition of Francisco Ramos)

Sixth—To the Sixth Interrogatory he says:

It was consigned to Companhia Luz Stearica. 3,087 sacks were damaged. About half a dozen sacks were opened to determine the damage. All sacks were in the same condition. An additional 197 bags were torn but not damaged by water. These bags were not considered because they were not covered by the insurance.

No. 7. If you have answered Interrogatory No. 5 in the affirmative, state (a) how many inspections were made by you; (b) when you made such inspection, or inspections; and (c) at what particular warehouse, dock, or other place [31] the shipment was located at the time you made such inspection or inspections.

Seventh—To the Seventh Interrogatory he says:

(a) Two.

(b) March 6 and March 8, 1946. (Here witness consulted notes.)

(c) At the mills of Cia. Luz Stearica."

The Court: Does the abbreviation Cia. correspond to our abbreviation Co.?

Mr. Howard: I believe it does, Your Honor.

Mr. Crutcher: That is my understanding, and the letters S. A. are used for a corporation.

The Court: The same as the British Ltd.?

Mr. Crutcher: That is my understanding, meaning Societe Anonyme.

"No. 8. State fully and in detail as to each inspection made by you, in what manner you made

(Deposition of Francisco Ramos)

such inspection, including whether the bags were examined individually or in tiers and about what percentage of the bags were thus examined.

Eighth—To the Eighth Interrogatory he says:

The damaged sacks could be seen by spots on the bag. These bags were separated from the others and piled in fifteen piles and counted. Six were then selected at random [32] and opened.

No. 9. State fully and in detail as to each such inspection what you found, upon examination, as to the external condition of said bags of flour, and particularly as to dryness or dampness.

Ninth—To the Ninth Interrogatory he says:

The sacks were dry but spotted. The flour had formed a hard crust.

No. 10. If in answer to the last preceding interrogatory you have stated that you found a condition of dampness on the external surfaces of the bags of flour, state the quantity or percentage of the shipment inspected that was found to contain dampened sacks.

Tenth—To the Tenth Interrogatory he says:

The sacks had already dried out.

No. 11. Were any samples obtained of the dampened portions of the flour shipment which had been inspected by you?

Eleventh—To the Eleventh Interrogatory he said:

Samples were taken from six bags.

12. State whether you personally, or individuals under your personal supervision, obtained the samples of flour from the shipment of flour discharged

(Deposition of Francisco Ramos)

from the steamer "Sweepstakes" on or about February 20, 1946, and to whom the samples of flour were delivered to by yourself or individuals under your personal supervision. [33]

Twelfth—To the Twelfth Interrogatory he says:

I personally took the samples and delivered them to Dr. A. Barreto, chemist, professor at the School of Agronomy.

No. 13. State whether a chemical analysis was obtained of the said samples, and if so, state by whom the chemical analysis was made, at whose request, and upon what date the report was requested and received.

Thirteenth—To the Thirteenth Interrogatory he says:

I requested an analysis from Dr. Barreto on March 7. The report of analysis was delivered on March 11.

No. 14. If your answer to Interrogatory No. 12 is in the affirmative, please refer to document attached hereto, marked Exhibit 1, purporting to be a photostatic copy of report written in the Portuguese language of A. Barreto, dated at Rio de Janeiro, March 2, 1946, and state whether it is a true copy of the report of chemical analysis which was requested on the damaged flour in this shipment.

Fourteenth—To the Fourteenth Interrogatory he says:

It is.

No. 15. State, if you know, whether a separate

(Deposition of Francisco Ramos)

analysis was made on the damaged flour and upon the surfaces of the packing material or bags in which the flour was contained.

Fifteenth—To the Fifteenth Interrogatory he says:

Yes, Dr. Barreto made separate analyses of the flour and [34] the material.

No. 16. Were any samples of the damaged or dampened flour preserved and available for examination at this time.

Sixteenth—To the Sixteenth Interrogatory he says:

No.

No. 17. State your opinion in detail from an inspection and examination of the damaged flour, and from consideration of the chemical analysis obtained on such flour, as to the nature of damage and the cause of such damage.

Seventeenth—To the Seventeenth Interrogatory he says:

From my inspection it appeared that the damage was caused by water. The chemical analysis showed it to be salt water.

No. 18. State the amount or percentage of damage or depreciation found by you from the inspection, examination and chemical analysis mentioned in the preceding interrogatory.

Eighteenth—To the Eighteenth Interrogatory he says:

It is my opinion that the damage was thirty-five per cent.

(Deposition of Francisco Ramos)

No. 19. State the method adopted by you in computing the amount or percentage of damage or depreciation mentioned in the preceding interrogatory. Nineteenth—To the Nineteenth Interrogatory he says:

The six sacks were opened. In each sack it was estimated that nine kilos of flour were damaged. The percentage was [35] therefore calculated at thirty-five per cent. It could be seen that the other unopened bags were in the same condition.

No. 20. Was a written report of your inspection and survey of this damaged flour prepared by you at the time of or shortly after your inspection of the shipment?

Twentieth—To the Twentieth Interrogatory he says:

Yes.

No. 21. If your answer to the preceding interrogatory is in the affirmative, please state whether you have in your custody a copy of said report of survey. Twenty-first—To the Twenty-first Interrogatory he says:

No.

* * *

No. 24. State whether you have examined the records of the Customs Warehouse at Rio de Janeiro to determine if a record was made of the discharge and disposition of this shipment of wheat flour consigned to Cia. Luz Stearica and discharged from the S.S. "Sweepstakes" at Rio de Janeiro on or about February 20, 1946.

(Deposition of Francisco Ramos)

Twenty-fourth—To the Twenty-fourth Interrogatory he says:

I examined the records. There is only a notation of the quantity of bags discharged directly to railroad cars of the port administration for shipment to the mill. There is no notation regarding condition of the shipment.

No. 25. If your answer to the preceding [36] interrogatory is in the affirmative, state whether or not such record is required to be retained in the files of said department or agency.

Twenty-fifth—To the Twenty-fifth Interrogatory he says:

A record of the quantity unloaded is in the files of the customshouse.

No. 26. If your answer to the preceding interrogatory is in the affirmative, please obtain, if possible, and deliver to the United States consular officer taking this deposition, a duly certified copy of such record with respect to the discharge and disposition of this flour shipment in the Customs Warehouse, said document to be authenticated by the U.S. consular officer and returned with this deposition, marked as Exhibit 3 for identification.

Twenty-sixth—To the Twenty-sixth Interrogatory he says:

I will try to obtain this record.

(Witness unable to obtain record.)

No. 27. Do you expect to be in the State of Wash-

(Deposition of Francisco Ramos)

ington, U.S.A., at any time during the next six months?

Twenty-seventh—To the Twenty-seventh Interrogatory he says:

No.”

The Court: Those connected with this case are excused until Monday afternoon, October 31, at 2 o'clock.

(At 5:10 o'clock p.m., Friday, October 28, 1949, proceedings recessed until 2:00 o'clock p.m., Monday, October 31, 1949.) [37]

October 31, 1949

The Court: You may proceed in the case on trial.

Mr. Howard: When we suspended last Friday, we had read the direct interrogatories of the witness Francisco Ramos and we were at the cross-interrogatories.

“Cross-Interrogatories

Interrogatory No. 1: At whose request and under what circumstances and for what purpose did you examine or survey the shipment of flour discharged from the Sweepstakes on or about February 20, 1946, consigned to Cia. Luz Stearica?

First—To the First Cross-Interrogatory he says:

The Cia. Luz Stearica requested the survey to determine the quantity of damaged flour.

Interrogatory No. 2: On what date were you first

(Deposition of Francisco Ramos)

contacted and requested to survey this flour, and state where the shipment was then located.

Second—To the Second Cross-Interrogatory he says:

On the 6th of March we received a letter requesting the survey. The letter was written March 2. The shipment was located at the company's mills.

Interrogatory No. 3: If you made more than one [38] survey, state the reasons for the additional surveys, when they were made and what was done by you on each occasion.

Third—To the Third Cross-Interrogatory he says:

On the first inspection, March 6, we were not able to agree as to the quantity of damage. On March 8 one more inspection was made. On the second occasion we called in Dr. Barreto who examined the sacks and gave his opinion as thirty-five per cent damage. The company protested and we finally agreed on forty per cent.

Interrogatory No. 4: If you personally took samples of flour for analysis, state the date when you took them, how they were taken, from how many bags, and whether they were taken only from wet bags.

Fourth—To the Fourth Cross-Interrogatory he says:

On March 6 I took six samples from six sacks, one from each sack. Samples were taken only from wet bags. I cut a piece of crusted flour with the sack material sticking to it.

(Deposition of Francisco Ramos)

Interrogatory No. 5: If you have stated that any of the bags were wet or damp when you examined them, state in detail the number of bags actually wet, the number of bags that were damp and the number of bags which showed evidence of being wet but had dried out at the time of inspection.

Fifth—To the Fifth Cross-Interrogatory he says:

All of the 3,087 sacks showed evidence of having been [39] wet, but they had already dried out at the time of inspection.

Interrogatory No. 6: Describe in detail the character of the wetness, dampness or stains on the bags, such as whether they were wet on the ends or sides of the bags, whether the whole surface was wet, or whether there were only spots or patches wet, and in the latter case state where the spots or patches were located on the bags or if the bags varied as to places and as to extent of wetness, please so state and describe as best you can.

Sixth—To the Sixth Cross-Interrogatory he says:

The damage was in patches of various sizes, some located on the ends, some on the sides. No system could be noted.

Interrogatory No. 7: Did you open the bags to determine how far into the bags the wet or dampness had penetrated into the flour, and if so, please describe the extent of penetration into the bags.

Seventh—To the Seventh Cross-Interrogatory he says:

I opened six bags. The dampness had penetrated to an average depth of five centimeters.

(Deposition of Francisco Ramos)

Interrogatory No. 8: If in answer to Interrogatory No. 17, you have stated that the flour was damaged by salt water, please explain how in your opinion the presence of chlorides would indicate salt water, and also:

(a) What percentage of chlorides is normally found in sound flour; [40]

(b) What percentage of chlorides is indicated to you in making your foregoing answer by the word "presenca."

(c) Do you base your opinion of the salt water damage on any other fact or condition than the chemical analysis above referred to, and if you do, please explain in detail what other factors or conditions were considered and how these indicate salt water damage.

Eighth—To the Eighth Cross-Interrogatory he says:

I am not a chemist and am unable to answer (a) and (b). My opinion as to the cause of damage is based on the opinion of Dr. Barreto.

Interrogatory No. 9: Was any chemical analysis made of the flour which you deemed to be sound and unaffected by any water, and if so, set forth the results of such analysis, or if not made, state why such analysis was not made.

Ninth—To the Ninth Cross-Interrogatory he says:

I do not believe that sound flour was analyzed, but if Dr. Barreto had the slightest doubt about the cause of damage he would probably have made a comparison. I cannot state for certain that a comparison was not made.

(Deposition of Francisco Ramos)

Interrogatory No. 10: Was any quantitative examination made of both damaged and sound flour from the same shipment;

(a) If it was made, set forth a comparison of the [41] results obtained;

(b) If not made, state how you know that the sound flour did not have the same percentage or "presenca" of chlorides as the alleged damaged flour.

Tenth—To the Tenth Cross-Interrogatory he says:

I do not think such an examination was made, therefore I cannot answer (a) and (b).

Interrogatory No. 11: In connection with Interrogatories Nos. 18 and 19, if you have answered that you determined a percentage of damaged flour out of the entire shipment, please also state the following:

(a) How many bags were actually opened and contents segregated?

(b) How was it possible to determine the extent of penetration of water into the bags?

(c) What method of segregation was used of sound and damaged flour?

(d) If there was no segregation, how did you determine the extent of damage as to each bag?

(e) Explain in detail how in your opinion the extent of chlorides indicated in the analysis as "presenca" would have any damaging effect on the flour and of what, in your opinion, the damage consisted.

(Deposition of Francisco Ramos)

Eleventh—To the Eleventh Cross-Interrogatory he says:

(a) Six sacks. [42]

(b) Each of the six sacks was cut open and the depth of penetration of damage measured.

(c) The sound and damaged flour was not segregated in computing the percentage of damage.

(d) The damage was estimated, taking into consideration the apparent depth of penetration and also the additional labor which would be required to salvage the good flour, and replacement of the bags.

(e) The question could be better answered by our chemist.

Interrogatory No. 12: In connection with your survey report please state:

(a) When you prepared it.

(b) Who asked you for the report and to whom you delivered it and when.

(c) What facts the report is based on and whether you made all of the observations contained in the report, or whether you obtained the information from someone else, and if so, from whom?

Twelfth—To the Twelfth Cross-Interrogatory he says:

(a) About the middle of March, after receipt of Dr. Barreto's analysis.

(b) The report was made automatically and was sent by mail to Cia. Luz Stearica.

(c) The report was based on my inspection and

(Deposition of Francisco Ramos)

on the chemical analysis. The opinion of Dr. Barreto also enters [43] into this report.

Interrogatory No. 13: What other signatures appear on the survey report and who is the person or persons signing the same. Did such person or persons also examine the flour?

Thirteenth—To the Thirteenth Cross-Interrogatory he says:

My signature and that of Christiano Santos Botelho appeared. Botelho did not examine the flour.

Interrogatory No. 14: Is it required or customary for Brazilian Customs to inspect such shipments of flour as the one in question and to make written report thereof?

Fourteenth—To the Fourteenth Cross-Interrogatory he says:

Brazilian customs only verify the quantity of sacks when, as in this case, the shipment is unloaded directly to rail cars.

* * *

Interrogatory No. 16: Does the Brazilian Customs report show any damage to the shipment of flour in question from water or salt water at the time of discharge to the Customs, or for any other reason.

Sixteenth—To the Sixteenth Cross-Interrogatory he says:

No.

Interrogatory No. 17: If discharge of the flour in question was not made to the Brazilian Customs,

(Deposition of Francisco Ramos)

state to whom the flour was delivered upon leaving the ship.

Seventeenth—To the Seventeenth Cross-Interrogatory he says: [44]

The flour was loaded on rail cars of the port administration and shipped direct to the consignee.

Interrogatory No. 18: Was the alleged damaged flour sold by you or under your direction, and if so, to whom and for what price?

Eighteenth—To the Eighteenth Cross-Interrogatory he says:

The damaged flour was not sold by us or under our direction.

Interrogatory No. 19: If the damaged flour was not sold, how did you or anyone else with your approval determine the extent and value of the damage, and please explain in detail.

Nineteenth—To the Nineteenth Cross-Interrogatory he says:

I don't know if the flour was sold. The damage value was calculated on a basis of percentage of damage, additional labor required, cost of new cotton bags.

Interrogatory No. 20: Is your determination of the extent and value of damaged flour based upon an estimate or guess, or was the flour actually segregated and reconditioned and the actual percentage of damaged flour determined?

Twentieth—To the Twentieth Cross-Interrogatory he says:

(Deposition of Francisco Ramos)

The value and extent of damage was based on an estimate.

Interrogatory No. 21: State with whom you have discussed the testimony you are now giving in this case, and when you did so. [45]

Twenty-first—To the Twenty-first Cross-Interrogatory he says:

I discussed it with Mr. Christiano Botelho after receiving the request to testify.”

Mr. Howard: That concludes the deposition of the witness Ramos, Your Honor. Libelant offers that in evidence at this time.

The Court: That is received in evidence as a part of libelant’s case in chief.

Mr. Howard: Libelant next calls as its witness by deposition A. Barreto.

DEPOSITION OF ANTONIO BARRETO

Direct Examination

“No. 1. Please state your name, age, nationality and where you now live and reside.

First—To the First Interrogatory he says:

Antonio Barreto, aged 53 years, Brazilian nationality, Rua Torres Homen, No. 638, Rio de Janeiro, Brazil.

No. 2. State your occupation or profession and where you were employed in February, 1946, and whether you are presently acting or engaged in the same capacity.

(Deposition of Antonio Barreto.)

Second—To the Second Interrogatory he says:

I was a professor of chemistry in the National School of Agriculture (Escola Nacional de Agronomia) in Rio de Janeiro and technical consultant in Brazil of the Monsanto Chemical Company in February, 1946. I am presently engaged [46] in the same capacities, as well as a professor in the Military Technical School (Escola Tecnica do Exercito).

No. 3. State what qualifications you have for such a position, indicating education, college or university degrees held by you, and training or previous experience in the capacity of a chemist or laboratory analyst.

Third—To the Third Interrogatory he says:

I graduated from the University of Brazil and have done post graduate work in agriculture and chemistry, receiving an agricultural engineer's degree and a degree in chemistry. I have been a chemist for about thirty years.

No. 4. State whether or not in February or March, 1946, certain samples of wheat flour identified as consigned to Cia. Luz Stearica at Rio de Janeiro and discharged from the S.S. "Sweepstakes" were submitted to you for examination or chemical analysis by Companhia Imobiliaria Financeira Americana S.A.

Fourth—To the Fourth Interrogatory he says:

Yes.

No. 5. If your answer to the preceding interrogatory is in the affirmative, please state whether

(Deposition of Antonio Barreto.)

you did conduct a chemical analysis of the flour samples and submit a written report of your findings on the same to Companhia Imobiliaria Financeira Americana S.A.

Fifth—To the Fifth Interrogatory he says: [47]

Yes.

No. 6. If your answer to the preceding interrogatory is in the affirmative, please refer to the document attached hereto, marked "Exhibit 4," purporting to be a report made by you to Companhia Imobiliaria Financeira Americana S.A., dated March 2, 1946, at Rio de Janeiro, and state whether the signature appearing thereon is your signature subscribed thereon by way of execution of said document.

Sixth—To the Sixth Interrogatory he says:

Yes."

* * *

"No. 7. Is the document marked "Exhibit 4" a full, true and correct report of the chemical analysis made by you on the samples of flour submitted to you by Companhia Imobiliara Financeira Americana S.A.?

Seventh—To the Seventh Interrogatory he says:

Yes."

Mr. Howard: Libelant offers Exhibit 4.

The Court: It is now in two parts. One appears to be something that looks like an original. It has attached to it what I believe to be a typewritten copy.

(Deposition of Antonio Barreto.)

Mr. Howard: Your Honor, I can explain that. The original is in Portuguese and counsel has agreed with me that translations made locally from Portuguese into English may be used subject to whatever objections he may have as to admissibility.

The Court: Is there any objection?

Mr. Wakefield: No objection.

The Court: Libelant's Exhibit 4 is now admitted.

(Libelant's Exhibit 4 received in evidence.) [50]

"No. 8. State fully and in detail what procedure was employed by you in determining the amount of chlorides present in the samples as reported in Exhibit 4."

Eighth—To the Eighth Interrogatory he says:

I made the analysis with silver nitrate and by the Volhard process.

No. 9. State, if you know, what amount of chlorides would normally be found to be present in good marketable wheat flour.

Ninth—To the Ninth Interrogatory he says:

Only a vestige of chlorides would normally be present.

No. 10. Did the results of the tests and analysis referred to in Interrogatory No. 8 indicate presence in the samples of chlorides in excess of the amount of chlorides normally present in good marketable wheat flour?

(Deposition of Antonio Barreto.)

Tenth—To the Tenth Interrogatory He Says:

Yes.

No. 11. If your answer to the preceding interrogatory is in the affirmative, please state what this result indicated as to the contamination of samples by salt water.

Eleventh—To the Eleventh Interrogatory He Says:

The flour had too much chloride because of contamination with salt water.

No. 12. How was the sodium content of the samples [51] of wheat flour determined?

Twelfth—To the Twelfth Interrogatory He Says:

By flame test, and my own process for sodium contamination which is published by Welcher in Organic Analytical Reagents, Volume I, page 180, and by Mellan in Organic Reagent in Inorganic Chemistry Analysis, page 552.

(Here witness consulted notes.)

No. 13. If in answer to the preceding interrogatory you state that the sodium content was determined by flame test, please describe fully and in detail the intensity and color of the flame created by burning extracts from the samples of wheat flour.

Thirteenth—To the Thirteenth Interrogatory He Says:

Qualitative tests were made by the flame test. The flame was pure yellow, intensive and high. For quantitative tests I used my own test, as mentioned above.

No. 14. Was the result of the tests reported in

(Deposition of Antonio Barreto.)

your answers to the two preceding interrogatories and in "Exhibit 4" indicative of an apparent excess of sodium content over the amount of sodium oxide usually found in good marketable wheat flour? Fourteenth—To the Fourteenth Interrogatory He

Says:

Yes.

No. 15. Was a comparative analysis made of the samples of flour submitted to you by Companhia Imobiliaria [52] Financeira Americana S. A. and other flour intentionally contaminated by salt water? Fifteenth—To the Fifteenth Interrogatory He

Says:

Yes, I always make this comparative test for all kinds of analyses.

No. 16. If your answer to the preceding interrogatory is in the affirmative, please state fully and in detail the comparative results of the testing and analysis of the samples of flour submitted by Companhia Imobiliaria Financeira Americana S. A. and other flour intentionally contaminated by sea water.

Sixteenth—To the Sixteenth Interrogatory He Says:

The analysis in each case was the same. The flour submitted by Companhia Imobiliaria Financeira Americana S. A. contained more sodium than the other flour.

No. 17. Were separate analyses made on the flour samples and upon the bags or packing material in which the flour was contained?

(Deposition of Antonio Barreto.)

Seventeenth—To the Seventeenth Interrogatory

He Says:

Yes.

No. 18. If your answer to the preceding interrogatory is in the affirmative, please state in detail what your finding was as to the presence or absence of salt crystals in scrapings from the external surfaces of the bags or containers. [53]

Eighteenth—To The Eighteenth Interrogatory he says:

It is absolutely impossible to see the crystals on the bags.

* * *

No. 20. If in answer to Interrogatory No. 18 you state that the scrapings from the external surfaces of the containers in which the wheat flour was submitted to you for analysis was liquid in form, please describe fully and in detail any test that was performed by you upon said scrapings and your findings with respect to the presence or absence of chlorides in said scrapings.

Twentieth—To The Twentieth Interrogatory, he says:

I did not take scrapings. I cut a piece of the bag, together with the wheat flour which was caked to the bag. I separated the bag from the flour and made an analysis of the bag. I found chloride in the bags.

No. 21. State the quantity by number of sacks or containers and pounds or other weight measure,

(Deposition of Antonio Barreto.)

if known, of the samples of flour submitted to you for analysis by Companhia Imobiliaria Financiera Americana S. A.

Twenty-First—To The Twenty-First Interrogatory he says:

I took six samples from six different bags, each sample weighing about two hundred grams.

No. 22. Were any of the samples of wheat flour submitted for analysis preserved by you and now available [54] for examination?

Twenty-Second—To The Twenty-Second Interrogatory he says:

No.

No. 23. Upon the basis of the tests, analysis and examination by you of samples of flour submitted in February or March, 1946, by Companhia Imobiliaria Financeira Americana S. A. as referred to in Exhibit 4, please state fully and in detail your opinion as to the nature and cause of any damage to the flour found by you.

Twenty-Third—To The Twenty-Third Interrogatory he says:

There is no doubt in my mind that the damage to the flour was caused by mould, bacteria and fungus, resulting from moisture, a direct consequence of contamination by salt water.

No. 24. How did you arrive at the percentage of 35% of value of the flour which was reported by you in Exhibit 4?

Twenty-Fourth—To The Twenty-Fourth Interrogatory he says:

(Deposition of Antonio Barreto.)

After examining the damaged bags I determined the percentage of damage on each bag; thirty-five per cent is the average of damage on each bag.

No. 25. Do you expect to be in the State of Washington, U. S. A., at any time within the next six months?

Twenty-Fifth—To the Twenty-Fifth Interrogatory he says:

No.” [55]

Mr. Howard: I would like at this time to read the English translation of Dr. Barreto’s report, now admitted as Libellant’s Exhibit 4.

The Court: You may do that.

Mr. Howard: “Photostatic copy of report of March 11, 1946, from A. Barreto, Rio de Janeiro, To: Messrs: Companhia Imobiliaria Financeira Americana S/A City.

“The analysis made on two samples of wheat flour, with the designations: Moinho da Luz—Recl. 18025, gave the following result;

Chlorites

(derivatives of chloric acid).....Presence

SulfatesTraces

SodiumPresence

Calcium and Magnesium.....Traces

Reaction Acid

“From the result of the above analysis, it is concluded that the average came from salt water.

“From the result of the analysis and by the in-

(Deposition of Antonio Barreto.)

spection proceeded, it was verified that the average extends to 35% of the value of the same flour.”

The Court: At this point we will take a recess of about ten mintues.

(Recess.) [56]

The Court: You may resume the reading of the deposition.

Cross-Interrogatories

“Interrogatory No. 1: Who delivered the samples of alleged damaged flour to you and when did you receive them?

First—To The First Cross-Interrogatory he says:

Cia. Luz Stearica on March 8, 1946. [Here witness consulted Exhibit No. 4.]

Interrogatory No. 2: In connection with the samples you received, please state the following:

- (a) How many samples did you receive?
- (b) How were they marked or identified?
- (c) In what form were the samples submitted and what quantity was there in each sample?
- (d) How many separate samples did you analyze?

(e) If you analyzed less than all of the samples, please state your method of selection of samples to be analyzed and why all of them were not analyzed.
Second—To The Second Cross-Interrogatory he says:

- (a) Six.
- (b) By name of the company, Cia. Luz Stearica, number of the claim and of the ship.

(Deposition of Antonio Barreto.)

(c) The samples were pieces of the bags with caked wheat flour sticking to them; two hundred grams in [57] each sample.

(d) Six.

(e) All six samples were analyzed."

Mr. Wakefield: May I digress for a moment and call the Court's attention to the fact that the reason for that last question is that the exhibit states that two samples were analyzed.

The Court: Some witness whose answers were read today has said that there were six samples taken, he did not know how many were analyzed.

Mr. Crutcher: The surveyor so testified, Your Honor.

Mr. Wakefield: Six were taken, and Dr. Barreto in his report says he examined two. In this cross-examination he says he examined six.

"Interrogatory No. 3: Where were these samples taken and what, if anything, did you have to do with obtaining or identifying the samples?

Third—To The Third Cross-Interrogatory he says:

They were taken at the storehouse and I was there watching while the samples were cut out and I witnessed the marking of the samples.

Interrogatory No. 4: Explain in detail the procedure you followed in making your analysis of the sample [58] or samples.

Fourth—To The Fourth Cross-Interrogatory he says:

All six samples were analyzed by the flame test,

(Deposition of Antonio Barreto.)

with silver nitrate, by the Volhard process, and by my own process for sodium contamination which is published by Welcher in Organic Analytical Reagents, Volume I, page 180, and by Mellan in Organic Reagent in Inorganic Chemistry Analysis, page 552.

Interrogatory No. 5: Did you make a quantitative examination of both the damaged and undamaged flour?

Fifth—To the Fifth Cross-Interrogatory he says: Yes.

Interrogatory No. 6: If you did make a quantitative examination, please give the comparison of the results obtained between the damaged and undamaged flour.

Sixth—To The Sixth Cross-Interrogatory he says:

I found that there was more sodium chloride in the damaged than in the undamaged flour.

* * *

Interrogatory No. 8: Your report states:

“Chlorides—presence” and Sodium—presence.” What percentage does this mean or can you state the percentage or amount of chlorides and sodium present in the alleged damaged flour?

Eight—To The Eight Cross-Interrogatory he says:

By “presence” is meant that there is too much chloride and sodium. I can’t remember the percentages.

Interrogatory No. 9: Is it your opinion that the presence of chlorides or of sodium or of both in the

(Deposition of Antonio Barreto.)

flour you examined must necessarily have come from salt water?

Ninth—To The Ninth Cross-Interrogatory he says:

Yes, because the flour was caked from having been wet.

Interrogatory No. 10: What is the basis of your opinion "that the damage ascertained must be attributed to salt water" and please explain this in detail.

Tenth—To The Tenth Cross-Interrogatory he says:

I have long experience in this line and have made hundreds of analyses of wheat flour. I have analyzed fresh water contamination and only a vestige of sodium chloride was present.

Interrogatory No. 11: Have you ever made any tests on undamaged flour by analysis of the ash to determine the mineral content of such flour, and if so, state what you have found with respect to the presence of chlorides and of sodium.

Eleventh—To The Eleventh Cross-Interrogatory he says:

Yes, there was only a vestige of chloride and of sodium; good wheat flour has more potassium chloride and calcium chloride, but none, or only a vestige, of sodium chloride.

Interrogatory No. 12: Do you deny that a qualitative ash analysis of flour not in contact with salt water will show the presence of chlorides and sodium, and if so, please explain. [60]

Twelfth—To The Twelfth Cross-Interrogatory he says:

(Deposition of Antonio Barreto.)

It will show some vestige of chlorides.

Interrogatory No. 13: Explain what the presence of sodium indicates with respect to any salt water contamination.

Thirteenth—To The Thirteenth Cross-Interrogatory he says:

If sodium is present in wheat flour it is evident that it is combined with chloride. Sodium alone does not necessarily indicate salt water contamination. Sodium and chloride in equal quantities in flour which is wet or caked indicates that this flour has been in contact with salt water.

Interrogatory No. 14: What percentage or amount of sodium did you find in the flour in question?

Fourteenth—To The Fourteenth Cross-Interrogatory he says:

I do not remember exactly—only that it was too much.

Interrogatory No. 15: What amount or percentage of sodium do you find in flour not contaminated with salt water?

Fifteenth—To The Fifteenth Cross-Interrogatory he says:

Only a vestige.

Interrogatory No. 16: If you admit or deny the presence of chlorides and/or sodium in sound flour not in contact with salt water, state whether this applies to all [61] wheat flour or whether the particular wheat used or processed in making the flour

(Deposition of Antonio Barreto.)

may cause the mineral content of the flour to vary, and please explain in detail.

Sixteenth—To The Sixteenth Cross-Interrogatory he says:

Yes, the particular wheat used or processed can cause a variation in the mineral content of the flour, but in the case of sodium and chlorides the variation is very small because too much sodium is poison to the plant.

Interrogatory No. 17: What is the basis of and the factors considered by you in coming to the conclusion that the damage to the flour was 35%?

Seventeenth—To The Seventeenth Cross-Interrogatory he says:

The average quantity of the damage and the nature of the damage—mould, bacteria, fungus growths and a bad odor to the flour.

Interrogatory No. 18: Is this alleged 35% damage the estimated damage sustained only to the damaged flour, or does it represent 35% of the value of the entire shipment, and please explain how you arrived at this figure.

Eighteenth—To The Eighteenth Cross-Interrogatory he says:

Thirty-five per cent was of the bags I saw in the storehouse. I saw only damaged bags; thirty-five per cent of the flour in the damaged bags was spoiled. I looked at about twenty of the bags taken from the damaged lot and concluded that the per-

(Deposition of Antonio Barreto.)

centage of damage was thirty-five per cent. [62]

Interrogatory No. 19: Please explain why, in your opinion, flour with a trace or the percentage of chlorides and/or sodium you found in the samples reduces its value in any respect, or reduces its value to the extent of 35%.

Nineteenth—To The Nineteenth Cross-Interrogatory he says:

The damage to the bags was because of wetting, not chlorides; moisture causes mould, bacteria, fungus, etc. There were sea algae on the bags.”

Mr. Wakefield: If the Court please, I would like to move to strike the last sentence, “There were sea algae on the bags.” as not responsive; also, the fact that his report, Exhibit 4, makes no mention of any such thing. It is purely a gratuitous, voluntary statement, not in accordance with the rest of his evidence.

The Court: Read the question.

Mr. Wakefield: “Please explain why, in your opinion, flour with a trace or the percentage of chlorides and/or sodium you found in the samples reduces its value in any respect, or reduces its value to the extent of 35%.”

We are talking about chlorides and sodium, and at the end of his answer he adds the gratuitous statement about sea algae, which is something not covered any [63] place in this testimony. I move it be stricken.

Mr. Howard: I submit, Your Honor, that is part

(Deposition of Antonio Barreto.)

of the witness' answer. Counsel in this cross-interrogatory submitted to him asked him to please explain why, and the fullest extent should be given to the witness in the scope of his answer as to explanation of the question that was asked. I think the part counsel objects to is a very material part of the answer and has a very definite bearing on this case.

The Court: He does not say that moisture causes sea algae. If he had put that in after fungus, I would not feel that it should be stricken, but I am not so sure that it is a fact, even in the absence of testimony, that sea algae is produced by moisture alone. I am not so sure it does not take something besides moisture to put sea algae on a wet sack, but whatever that may be, I think it is a voluntary statement.

The request for striking is granted.

"Interrogatory No. 20: State with whom you have discussed the testimony you are now giving in this deposition and when you discussed it on each occasion that you discussed it.

Twentieth—To The Twentieth Cross-Interrogatory he says:

I discussed it with Mr. Botelho and Mr. Ramos in 1946. [64] Since then I have not discussed it with anyone else."

Mr. Howard: That concludes the deposition of Dr. Barreto, and libelant offers that deposition in evidence.

The Court: It is received in evidence as a part of libelant's case in chief.

Mr. Howard: Next, if the Court please, libellant will call the witness by deposition Mr. Jorge Quadros Ferreira.

DEPOSITION OF JORGE FERREIRA

Direct Examination

“Interrogatory No. 1: Please state your name, age, nationality and where you now reside?

First—To The First Interrogatory he says:

Jorge Quadros Ferreira; 26; Brazilian; Rua Alecrim No. 824, Rio de Janeiro, Brazil.

Interrogatory No. 2: State by whom, where and in what capacity you were employed in February and March, 1946.

Second—To The Second Interrogatory he says:

I was employed by Moinho da Luz, Rua Benedito Ottoni, No. 24, Rio de Janeiro, as office clerk.

Interrogatory No. 3: State for how long you have been employed in the above capacity; also whether you are still employed by the same concern and in the same capacity.

Third—To The Third Interrogatory he says: [65]

I was employed from 1944 to 1947 in this capacity and am still employed by the aforementioned company with title of chief clerk.

Interrogatory No. 4: State the duties of your employment and what experience and training you have in connection with the position which you held in February and March, 1946.

Fourth—To The Fourth Interrogatory he says:

(Deposition of Jorge Ferreira.)

My duties were those of an office clerk, including payment of shipping expenses and recording receipt of cargoes. I had nine years' experience and training with the company prior to February-March 1946.

Interrogatory No. 5: Are you familiar with a certain shipment of 10,500 bags of wheat flour consigned to Companhia Luz Stearica and shipped on board the S.S. "Sweepstakes" from New York, arriving at Rio de Janeiro about February 20, 1946; and state generally what your duties or activities were with respect to such shipment.

Fifth—To The Fifth Interrogatory he says:

I am familiar with the shipment; inspect and check on arrival of bags at the warehouse.

Interrogatory No. 6: Please state the date or dates upon which this shipment of flour arrived at the consignee's mill or warehouse from the vessel.

Sixth—To The Sixth Interrogatory he says:

February 22, 1946, delivery [66] began. Delivery continued over a period of some days.

Interrogatory No. 7: Describe the warehouse or structure in which the shipment of flour was stored by consignee in February and March, 1946, including in detail the type and condition of flooring, walls and roof, and the presence or absence of dampness within the structure by reason of leakage or otherwise at that time.

Seventh—To The Seventh Interrogatory he says:

The warehouse is of concrete; the floor and roof are of concrete and walls of building tile. The building has three floors, with ground floor one meter

(Deposition of Jorge Ferreira.)

above the ground, and concrete floor covered by asphalt. No leakage or other dampness was present at the time.

Interrogatory No. 8: For what purpose was the warehouse or structure designed, in which this shipment of flour was stored by consignee?

Eighth—To The Eighth Interrogatory he says:

The building was designed for the storage of flour.

Interrogatory No. 9: Have you ever experienced difficulty with flour becoming damp or damaged by wetness while stored in the above described warehouse?

Ninth—To The Ninth Interrogatory he says:

No previous difficulty has been experienced with flour becoming damp or being dampened. [67]

Interrogatory No. 10: Did you inspect the bags of flour in this shipment upon arrival at consignee's warehouse to determine the extent of damage sustained to the flour by wetness?

Tenth—To The Tenth Interrogatory he says:

I inspected the flour at time of arrival, setting aside the flour which was wet.

Interrogatory No. 11: Did you supervise an inspection of this shipment of flour at consignee's warehouse to determine the extent of damage sustained by wetness?

Eleventh—To The Eleventh Interrogatory he says:

There was an inspector at each of the entries where flour was being brought into the warehouse from railroad cars. I supervised the inspectors in their activities.

(Deposition of Jorge Ferreira.)

Interrogatory No. 12: If your answer to either Interrogatory No. 10 or No. 11 is in the affirmative, please state your finding as to the extent of damage to the shipment of flour by wetness, expressing the same in terms of number of bags damaged, weight of the flour damaged to the extent that it was unmarketable, and/or the percentage of the flour in the damaged bags that was found to be damaged by wetness in the inspection made by you or under your supervision.

Twelfth—To The Twelfth Interrogatory he says:

I do not recall the exact number of bags damaged and [68] consequently cannot estimate the weight of flour damaged to such extent as to render it unmarketable.

Interrogatory No. 13: Were you present at consignee's warehouse in Rio de Janeiro when Dr. Antonio Barreto inspected and sampled the bags of flour in this shipment to determine the extent of damage sustained by wetness?

Thirteenth—To The Thirteenth Interrogatory he says:

I was not present.

Interrogatory No. 14: Dr. Barreto has stated that he found the wetness or dampness in each bag of damaged flour to be 35% of the total quantity. Please state whether you concur in that finding, and whether you concurred in Dr. Baretto's finding at the time he made his determination. If you did not concur at that time, or do not now concur with such

(Deposition of Jorge Ferreira.)

determination by Dr. Barreto, please explain in detail the reason therefor.

Fourteenth—To The Fourteenth Interrogatory he says:

The sacks were not opened by me and I am unable to give an opinion on the accuracy of Dr. Barreto's findings.

Interrogatory No. 15: State the total number of sacks of flour which were found to be damaged by wetness upon arrival of the shipment at consignee's warehouse.

Fifteenth—To The Fifteenth Interrogatory he says:

I do not know the number of sacks of flour, but I estimate the number to be over three [69] thousand.

Interrogatory No. 16: Was it possible to sell the sacks of flour mentioned in Interrogatory No. 15 in their condition as delivered to consignee's warehouse, without reconditioning the same?

Sixteenth—To The Sixteenth Interrogatory he says:

It was impossible to sell the flour mentioned in Question 15 above, and we did not attempt to do so.

Interrogatory No. 17: State what was done by consignee with respect to disposition of the flour in this shipment after damage by wetness to a portion thereof was discovered.

Seventeenth—To The Seventeenth Interrogatory he says:

The flour in good condition was sold and the damaged flour was sent to the mill to be reconditioned.

Interrogatory No. 18: Was it possible to sell that

(Deposition of Jorge Ferreira.)

portion of the flour in the bags which was damaged by wetness, and if so, to whom and for what price? Eighteenth—To The Eighteenth Interrogatory he says:

The damaged sacks were sent to the mill for separation of the wetted and unwetted flour. The former was thrown away, since Brazilian public health laws forbid its sale. I am not informed of the price or purchaser of the unwetted portion of the flour.

Interrogatory No. 19: Describe in detail the proceeding or method in reconditioning the marketable flour [70] after separation from damaged flour.

Nineteenth—To The Nineteenth Interrogatory he says:

I am not acquainted with the reconditioning process.

Interrogatory No. 20: If you have a record of the exact quantities of flour recovered from the damaged bags and reconditioned, please state the amounts recovered. If no such figures are available, explain why it is not possible for you to furnish such data.

Twentieth—To The Twentieth Interrogatory he says:

I do not have such a record, since the incident occurred three years ago. It would be necessary to consult the company's accounts where I believe such a record would be available.

Interrogatory No. 21: Please state what the actual value was between February 22 and March 1,

(Deposition of Jorge Ferreira.)

1946, at Rio de Janeiro of a fifty-kilo bag of Aida brand wheat flour, based upon the price for which the consignee could sell such flour on the open market at that time and place.

Twenty-First—To The Twenty-First Interrogatory he says:

I am unable to state the actual value for this type of flour at the time stated, based on selling price on the open market.

Interrogatory No. 22: What was the delivered cost per fifty-kilo bag of the flour in this shipment to the consignee, based upon the invoice cost and charges for ocean [71] freight and insurance? Please indicate any other incidental charges that are considered by the consignee in arriving at the delivered cost per bag of flour in this shipment.

Twenty-second—To the Twenty-second Interrogatory he says:

I am unable to state the delivered cost, such figures being available from the accounting department.

Cross-Interrogatories

Cross-Interrogatory No. 1: When and in what manner and by whom was the matter of your giving this deposition first brought to your attention?

First—To the First Cross-Interrogatory he says:

I was informed of the necessity of giving this deposition about one month ago, by the manager of the company.

Cross-Interrogatory No. 2: With whom and

(Deposition of Jorge Ferreira.)

when did you first discuss the matters you have testified to in this deposition? Please explain in detail.

Second—To the Second Cross-Interrogatory he says:

I did not discuss the matter with anyone but was merely informed by the manager of the company. He gave me a list of questions which I believe to be the same as the present ones.

Cross-Interrogatory No. 3: Have you been testifying from memory or did you make some record of these matters at [72] the time they occurred?

Third—To the Third Cross-Interrogatory he says:

I have mostly testified from memory but I have consulted records made at the time the shipment was received.

Cross-Interrogatory No. 4: If you have refreshed your memory from records, please state what these records are and when made and where they have been kept since you made them.

Fourth—To the Fourth Cross-Interrogatory he says:

I consulted personal records made at the time the shipment was received. The records were kept in my desk at the place where I am employed.

Cross-Interrogatory No. 5: How many shipments of flour similar to the shipment in question which arrived on the S.S. Sweepstakes about February 20, 1946, does Companhia Luz Stearica receive in a year's time?

Fifth—To the Fifth Cross-Interrogatory he says:

(Deposition of Jorge Ferreira.)

During 1946 and 1947 the company received a total of 200,000 bags, but since then only small quantities have been received. I do not know how many shipments were involved.

Cross-Interrogatory No. 6: Do you inspect all flour received by Companhia Luz Stearica and if so, state how many lots of flour you have inspected since March, 1946, to date.

Sixth—To the Sixth Cross-Interrogatory he says:

I used to make all inspections, but ceased to do so at [73] the end of 1947. I do not know how many inspections I made during this period.

Cross-Interrogatory No. 7: For what purpose do you inspect the flour, and do you do this personally or is it done under your supervision?

Seventh—To the Seventh Cross-Interrogatory he says:

I supervised the inspection of the flour to determine its condition, the number of bags delivered, and the number damaged. The supervision was done under my direction.

Cross-Interrogatory No. 8: Explain in detail how you make your inspection.

Eighth—To the Eighth Cross-Interrogatory he says:

The employees separated the wet or damaged bags to be counted separately. I verified the division.

Cross-Interrogatory No. 9: What record do you make of such inspections?

Ninth—To the Ninth Cross-Interrogatory he says:

I made a record of the number of bags wet or damaged.

(Deposition of Jorge Ferreira.)

Cross-Interrogatory No. 10: What is done with the record?

Tenth—To the Tenth Cross-Interrogatory he says:

This record was sent to the manager of the company for whatever action he desired to take.

Cross-Interrogatory No. 11: If you inspected the shipment of flour which arrived in Rio de Janeiro on the [74] S.S. Sweepstakes about February 20, 1946, state exactly and in detail what was done as follows:

(a) The day and the hours when the inspection was made;

(b) Where the flour was located at that time;

(c) How it was piled;

(d) Had there been any prior segregation of the wet sacks;

(e) Who was present at the time;

(f) Who assisted with the inspection;

(g) How did you make your inspection, as follows:

(1) The number of bags you actually inspected;

(2) Were any bags opened and contents examined, and if so, how many bags were opened;

(3) Of what did the examination consist, that is, whether visual, by feeling, testing mechanically or chemically, tasting or otherwise.

(h) How many bags were found damaged;

(i) What was the nature of the alleged damage;

(Deposition of Jorge Ferreira.)

(j) Was the damage uniform on each bag or did it vary, and if so, explain in detail how it varied;

(k) What was the wet area on each bag, that is, how much was wet and was it wet on the top, the bottom, the sides or the ends;

(l) What was the extent of the wet penetration into the flour;

(m) What the wet portion of the flour spoiled or unfit for use and if so, please explain why.

Eleventh—To the Eleventh Cross-Interrogatory he says:

(a) Sacks began to arrive on February 22, 1946. The [75] hours were 7:00 a.m. to 4:00 p.m., with one hour for lunch.

(b) The flour was on railway cars being transferred from the cars to the warehouse.

(c) It was stacked on open railroad cars.

(d) No.

(e) Fifteen or sixteen laborers, three checkers and I were present at the time.

(f) By three checkers as indicated above.

(g) (1) The entire shipment was inspected, but I do not know the number of bags; (2) None were opened; (3) The examination was visual and tactile.

(h) I do not know the exact number, but estimate about three thousand bags.

(i) The sacks were wet.

(j) The damage varied; some bags were wet on top, others on the bottom or sides, and others completely wetted.

(Deposition of Jorge Ferreira.)

(k) Some bags were wet on top, others on the bottom or sides, and others completely wetted.

(l) Penetration was varying, but I am unable to give a definite statement since I did not open the sacks.

(m) As I said before, I did not open the bags and therefore I cannot state definitely what portion was spoiled.

Cross-Interrogatory No. 12: Did you segregate the wet sacks and the sound sacks? [76]

Twelfth—To the Twelfth Cross-Interrogatory he says:

Yes.

Cross-Interrogatory No. 13: Were all of the wet sacks opened and inspected?

Thirteenth—To the Thirteenth Cross-Interrogatory he says:

At the time of which I speak, no.

Cross-Interrogatory No. 14: If all wet sacks were opened, was the flour in each sack separated as to sound and damaged flour within each sack?

Fourteenth—To the Fourteenth Cross-Interrogatory he says:

I did not open the wetted bags, which were sent to the mill.

Cross-Interrogatory No. 15: If it was not separated as mentioned in the previous cross-interrogatory, how was your determination made as to the extent of damage?

Fifteenth—To the Fifteenth Cross-Interrogatory he says:

(Deposition of Jorge Ferreira.)

I did not make a determination of the extent of the damage.

Cross-Interrogatory No. 16: If in answer to Cross-Interrogatory No. 12 you have stated a percentage of damaged flour in wet sacks, please state how this percentage figure was determined to be accurate.

Sixteenth—To the Sixteenth Cross-Interrogatory he says:

No percentages were stated.

Cross-Interrogatory No. 17: Have you ever had [77] experience with or made a test of a sack of flour totally immersed in water for, say, from 12 to 24 hours, to determine the extent or percentage of water damage to such a sack of flour?"

Mr. Howard: Libelant objects to that question. As I recall, the answer is "No," but for the sake of the record at this time I object to the question as not being within the proper scope of direct examination.

The Court: Is it not meant to test the witness' knowledge as to damage by wetting?

Mr. Wakefield: That was the purpose.

The Court: The objection is overruled.

"Seventeenth—To the Seventeenth Cross-Interrogatory he says:

I have never made such a test.

* * *

Cross-Interrogatory No. 19: What was done with the wet sacks of flour?

(Deposition of Jorge Ferreira.)

Nineteenth—To the Nineteenth Cross-Interrogatory he says:

They were sent to the mill.

Cross-Interrogatory No. 20: Was any attempt made to recondition the damaged portion of the flour and if so, what did you or the company do in this respect?

Twentieth—To the Twentieth Cross-Interrogatory he says: [78]

I only know that this flour was sent to the mill.

Cross-Interrogatory No. 21: Was the damaged portion of the flour (1) sold; (2) offered for sale, or (3) otherwise used by the company and please explain in detail how the damaged flour was disposed of by the company.

Twenty-First—To the Twenty-First Cross Interrogatory he says:

The damaged portion was not sold, and I do not know how it was disposed of.

Cross-Interrogatory No. 22: Is the claim of 35% of damage to flour in the wet sacks based upon a total loss of the said 35% damaged flour or was some value realized from the damaged portion of the flour?

Twenty-Second—To the Twenty-Second Cross Interrogatory he says:

I have no knowledge regarding this question.

Cross-Interrogatory No. 23: Are there records or published prices of fifty kilo bags of Aida Brand wheat flour applicable to the months of February

(Deposition of Jorge Ferreira.)

or March, 1946, at Rio de Janeiro, as sold by the mills or companies such as Companhia Luz Stearica?

Twenty-Third—To the Twenty-Third Cross-Interrogatory he says:

I have no records, but the company has them.

Cross-Interrogatory No. 24: State what that price was and furnish a copy of the record or published price list of such flour.

Twenty-Fourth—To the Twenty-Fourth Cross-Interrogatory he says: [79]

I do not know the price and am unable to furnish the desired record.

Cross-Interrogatory No. 25: To whom did Companhia Luz Stearica sell its flour in March, 1946?

Twenty-Fifth—To the Twenty-Fifth Cross-Interrogatory he says:

I do not know.

Cross-Interrogatory No. 26: On what basis was such flour sold as to the size of sacks, the brand or other basis of sale?

Twenty-Sixth—To the Twenty-Sixth Cross-Interrogatory he says:

I do not know.

Cross-Interrogatory No. 27: What was the actual selling price per sack of flour as is involved in this action and which was not damaged?

Twenty-Seventh—To the Twenty-Seventh Cross-Interrogatory he says:

I do not remember.

Cross-Interrogatory No. 28: How does this price

(Deposition of Jorge Ferreira.)

compare with the landed cost to the company at Rio de Janeiro?

Twenty-Eighth—To the Twenty-Eighth Cross-Interrogatory he says:

I have no information on this point.

Cross-Interrogatory No. 29: Was there a strong demand for wheat flour in Rio de Janeiro in March, 1946?

Twenty-Ninth—To the Twenty-Ninth Cross-Interrogatory he says:

Yes.

Cross-Interrogatory No. 30: Was the price higher [80] or lower than normal?

Thirtieth—To the Thirtieth Cross-Interrogatory he says:

The price was fixed by regulation.

Cross-Interrogatory No. 31: Was there an adequate supply of wheat flour, or was there a scarcity at this time—March, 1946?

Thirty-First—To the Thirty-First Cross-Interrogatory he says:

There was a slight scarcity, but the demand was met largely by importations. Noticeable shortages occurred when shipments failed to arrive for any reason."

Mr. Howard: That concludes the deposition of Mr. Ferreira. Libelant offers that in evidence as part of its case in chief.

The Court: That deposition is received as part of libelant's case in chief.

Mr. Howard: Next, Your Honor, libelant will call the witness by deposition Frederick Albert Carl Rols Herold.

DEPOSITION OF FREDERICK HEROLD

Direct Examination

“Interrogatory No. 1: Please state your name, age, nationality and where you now reside?

First—To the First Interrogatory he says:

Frederick Albert Carl Rolf Herold, 49 years, British, Avenida Epitacio Pessoa, No. 3712, apartment 203, Leblon, [81] Rio de Janeiro, Brazil.

Interrogatory No. 2: State by whom, where, and in what capacity you were employed in February and March, 1946.

Second—To the Second Interrogatory he says:

I am employed by Moinho da Luz, a division of Cia. Luz Stearica, at Rua do Rosario, No. 160, office of Moinho da Luz division. I was accountant.

Interrogatory No. 3: State for how long you have been employed in the above capacity; also whether you are still employed by the same concern and in the same capacity.

Third—To the Third Interrogatory he says:

Since July 1, 1941, and am still in it, exercising the same function.

Interrogatory No. 4: State the duties of your employment and what experience and training you have in connection with the position which you held in February and March, 1946.

Fourth—To the Fourth Interrogatory he says:

(Deposition of Frederick Herold.)

General supervision of all accounting matters. I had had over twenty years' accounting experience at that time.

Interrogatory No. 5: Are you familiar with a certain shipment of 10,500 bags of wheat flour consigned to Companhia Luz Stearica and shipped on board the S.S. "Sweepstakes" from New York, arriving at Rio de Janeiro about February 20, 1946; and state generally what your [82] duties or activities were with respect to such shipment.

Fifth—To the Fifth Interrogatory he says:

Yes, I am aware of it. My duties were to deal with the accounting procedure in recording invoices, subsequent payment of the drafts, etc.

Interrogatory No. 6: Please state the date or dates upon which this shipment of flour arrived at the consignee's mill or warehouse from the vessel.

Sixth—To the Sixth Interrogatory he says:

[Here witness consulted notes.]

Between February 22 and March 1, 1946, both dates inclusive.

Interrogatory No. 7: Describe the warehouse or structure in which the shipment of flour was stored by consignee in February and March, 1946, including in detail the type and condition of flooring, walls and roof, and the presence or absence of dampness within the structure by reason of leakage or otherwise at that time.

Seventh—To the Seventh Interrogatory he says:

I cannot reply to this question. On the few

(Deposition of Frederick Herold.)

occasions when I have visited the warehouse, I recall noting that it was a concrete structure, part of a unit which included mill proper, silos and, I believe, offices.

Interrogatory No. 8: For what purpose was the warehouse or structure designed, in which this shipment of [83] flour was stored by consignee?

Eighth—To the Eighth Interrogatory he says:

I do not know in what building the shipment was stored, and therefore I cannot reply to this question.

Interrogatory No. 9: Have you ever experienced difficulty with flour becoming damp or damaged by wetness while stored in the above-described warehouse?

Ninth—To the Ninth Interrogatory he says:

Not as far as I am aware.

Interrogatory No. 10: Did you inspect the bags of flour in this shipment upon arrival at consignee's warehouse, to determine the extent of damage sustained to the flour by wetness?

Tenth—To the Tenth Interrogatory he says:

Definitely not.

Interrogatory No. 11: Did you supervise an inspection of this shipment of flour at consignee's warehouse to determine the extent of damage sustained by wetness?

Eleventh—To the Eleventh Interrogatory he says:
No.

(Deposition of Frederick Herold.)

Interrogatory No. 13: Were you present at consignee's warehouse in Rio de Janeiro when Dr. Antonio Barreto inspected and sampled the bags of flour in this shipment to determine the extent of damage sustained by wetness? [84]

Thirteenth—To the Thirteenth Interrogatory he says:

No.

Interrogatory No. 14: Dr. Barreto has stated that he found the wetness or dampness in each bag of damaged flour to be 35% of the total quantity. Please state whether you concur in that finding, and whether you concurred in Dr. Barreto's finding at the time he made his determination. If you did not concur at that time, or do not now concur with such determination by Dr. Barreto, please explain in detail the reason therefor.

Fourteenth—To the Fourteenth Interrogatory he says:

I have no opinion to offer, since I never see the flour. All claims and surveys are made on the spot, and damages agreed to by the people or company making the survey with the mill officials.

Interrogatory No. 15: State the total number of sacks of flour which were found to be damaged by wetness upon arrival of the shipment at consignee's warehouse.

Fifteenth—To the Fifteenth Interrogatory he says:

[Here witness consulted notes.]

(Deposition of Frederick Herold.)

3,087. Other bags (197) were torn, but no mention is made of them, and as far as I recall, they were not covered by insurance.

Interrogatory No. 16: Was it possible to sell the sacks of flour mention in Interrogatory No. 15 in their [85] condition as delivered to consignee's warehouse, without reconditioning the same?

Sixteenth—To the Sixteenth Interrogatory he says:

We have never done so, and I believe that this is prohibited by law. We have never sold any damaged flour.

Interrogatory No. 17: State what was done by consignee with respect to disposition of the flour in this shipment after damage by wetness to a portion thereof was discovered.

Seventeenth—To the Seventeenth Interrogatory he says:

I cannot say definitely what was done with this shipment, since I was not present, but I understand that all damaged flour is separated manually.

Interrogatory No. 18: Was it possible to sell that portion of the flour in the bags which was damage by wetness, and if so, to whom and for what price?

Eighteenth—To the Eighteenth Interrogatory he says:

I understand this question to refer to the flour actually damaged by water; if so, I believe it is quite unsaleable. I understand that it is always thrown away.

(Deposition of Frederick Herold.)

Interrogatory No. 19: Describe in detail the proceeding or method used in reconditioning the marketable flour after separation from damaged flour. Nineteenth—To the Nineteenth Interrogatory he says:

Again I cannot reply from my own observance but I am [86] led to believe that remaining good flour is sent into the mill for remixing purposes, to be mixed with other good flour being milled.

Interrogatory No. 20: If you have a record of the exact quantities of flour recovered from the damaged bags and reconditioned, please state the amounts recovered. If no such figures are available, explain why it is not possible for you to furnish such data.

Twentieth—To the Twentieth Interrogatory he says:

No such records are available and I obviously cannot say why it is not possible to furnish them. Our company is a flour-milling company and in normal times it does not import flour but only wheat.

Interrogatory No. 21: Please state what the actual value was between February 22 and March 1, 1946, at Rio de Janeiro of a fifty-kilo bag of Aida brand wheat flour, based upon the price for which the consignee could sell such flour on the open market at that time and place.

Twenty-First—To the Twenty-First Interrogatory he says:

(Deposition of Frederick Herold.)

According to our records the selling price was 137 cruzeiros (Cr\$137,00) per sack of fifty kilos.”

Mr. Wakefield: If the Court please, at this point and with respect to Interrogatory No. 21 and the answer, I want to interpose an objection which does not appear [87] until the cross-examination, but based upon the cross-examination which will appear, I want to object to it as it appears that the witness has no information or knowledge that the price was fixed by Government order. He was asked to furnish a copy of such order or other record concerning the price, which he failed to do, and therefore I want to note my objection because after the cross-examination is read I will want to come back and move to strike the answer to Interrogatory No. 21.

The Court: On what ground?

Mr. Wakefield: On the ground that the cross-examination shows that the man does not have knowledge, and he fails to furnish a copy of the price or the regulation which was demanded.

The Court: Proceed. We will deal with that when we come to it.

Mr. Howard: At this point I might advise the Court that Mr. Wakefield has agreed by oral stipulation that the rate of exchange that can be considered as applicable on the cruzeiros that are mentioned in this and subsequent interrogatories is 20.10; in other words, 20.10 cruzeiros equal \$1.00 U. S. funds. That will mean some slight deviation in the figures I advised Your Honor on Friday.

(Deposition of Frederick Herold.)

The Court: Will you remind me of that in the course [88] of argument?

Mr. Howard: Yes, Your Honor.

“Interrogatory No. 22: What was the delivered cost per fifty-kilo bag of the flour in this shipment to the consignee, based upon the invoice cost and charges for ocean freight and insurance? Please indicate any other incidental charges that are considered by the consignee in arriving at the delivered cost per bag of flour in this shipment.

Twenty-Second—To the Twenty-Second Interrogatory he says:

10,500 bags of flour of 50 kilos—“Sweepstakes”

US\$49,867.25 at 20,10	Cr\$ 1.002.331,80
Stamps on request for exchange ...	3.892,80
Customs clearance	7.654,00
Port discharging	10.256,60
Discharge checking expenses	3.973,80
Transport to mill	3.614,70

TotalCr\$ 1.031.723,70
 Cost per sack: Cr\$98.25⁹⁴.

Cross-Interrogatories

Cross-Interrogatory No. 1: When and in what manner and by whom was the matter of your giving this deposition first brought to your attention?

First—To the First Cross-Interrogatory he says:

I can't recall the date. It was brought to my attention by a representative of the Cia. Immobiliaria

(Deposition of Frederick Herold.)

Financeira [89] Americana, who are representatives of the underwriters, by a personal visit, the representative of the company calling at our office.

Cross-Interrogatory No. 2: With whom and when did you first discuss the matters you have testified to in this deposition? Please explain in detail.

Second—To the Second Cross-Interrogatory he says:

I can't recall the date, but I discussed the matters with Dr. Hugo Delamare, who is our mill manager at the time it was brought to my notice. I believe this was two or three months ago, but I cannot say exactly.

Cross-Interrogatory No. 3: Have you been testifying from memory or did you make some record of these matters at the time they occurred?

Third—To the Third Cross-Interrogatory he says:

I made no record at the time the matter occurred. I am testifying from knowledge, aided by one or two notes dealing with specific figures.

Cross-Interrogatory No. 4: If you have refreshed your memory from records, please state what these records are and when made and where they have been kept since you made them.

Fourth—To the Fourth Cross-Interrogatory he says:

The date of entry I have taken from daily statements received from the mill; the cost of the flour I have taken [90] from our accounting records. These records are kept at our office at Rua Rosario,

(Deposition of Frederick Herold.)

No. 160, and they were made on the occasion, in February or possibly March, 1946.

Cross-Interrogatory No. 5: How many shipments of flour similar to the shipment in question which arrived on the S.S. Sweepstakes about February 20, 1946, does Companhia Luz Stearica receive in a year's time?

Fifth—To the Fifth Cross-Interrogatory He Says:

As mentioned above, we are not normally flour importers and there have been occasions when, to the best of my knowledge and belief, not a single shipment has been received in a year's time.

Cross-Interrogatory No. 6: Do you inspect all flour received by Companhia Luz Stearica and if so, state how many lots of flour you have inspected since March, 1946, to date.

Sixth—To the Sixth Cross-Interrogatory He Says:

No, I do not inspect any of them.

* * *

Cross-Interrogatory No. 12: Did you segregate the wet sacks and the sound sacks?

Twelfth—To the Twelfth Cross-Interrogatory He Says:

I did not.

Cross-Interrogatory No. 13: Were all of the wet sacks opened and inspected? [91]

Thirteenth—To the Thirteenth Cross-Interrogatory He Says:

I cannot say. [92]

* * *

(Deposition of Frederick Herold.)

Cross-Interrogatory No. 19: What was done with the wet sacks of flour?

Nineteenth—To the Nineteenth Cross-Interrogatory
He Says:

From my own knowledge, I cannot say.

Cross-Interrogatory No. 20: Was any attempt made to recondition the damaged portion of the flour and if so, what did you or the company do in this respect?

Twentieth—To the Twentieth Cross-Interrogatory
He Says:

As far as I know, no. The good flour is returned to the mill for re-mixing in such cases and even this statement I make on the basis of general knowledge, since I have never seen it happen.

Cross-Interrogatory No. 21: Was the damaged portion of the flour (1) sold; (2) offered for sale, or (3) otherwise used by the company and please explain in detail how the damaged flour was disposed of by the company?

Twenty-First—To the Twenty-First Cross-Interrogatory He says:

1. No. [94]
2. No.
3. No. The damaged flour was thrown away.

Cross-Interrogatory No. 22: Is the claim of 35% of damage to flour in the wet sacks based upon a total loss of the said 35% damaged flour or was some value realized from the damaged portion of the flour?

(Deposition of Frederick Herold.)

Twenty-Second—To the Twenty-Second Cross-Interrogatory he says:

I gather that it was based on an estimated figure. No value was realized from the damaged portion.

Cross-Interrogatory No. 23: Are there records or published prices of fifty kilo bags of Aida Brand wheat flour applicable to the months of February or March, 1946, at Rio de Janeiro, as sold by the mills or companies such as Companhia Luz Stearica?

Twenty-Third—To the Twenty-Third Cross-Interrogatory He Says:

I don't think there are published prices. Prices of flour in recent years have been fixed by the Central Price Commission both for manufactured and imported flour. We sell our flour at those prices.

Cross-Interrogatory No. 24: State what that price was and furnish a copy of the record or published price list of such flour.

Twenty-Fourth—To the Twenty-Fourth Cross-Interrogatory He Says:

I cannot furnish a record, but as I have stated, I believe the prices to have been 137 cruzeiros per bag of [95] fifty kilos of this brand or type."

Mr. Wakefield: If the Court please, that is the answer that I wish to move to strike, the answer to Cross-Interrogatory No. 24, and also the answer to direct Interrogatory No. 21, for the reason that the answer to Cross-Interrogatory No. 23 shows that the price of imported wheat flour at Rio de Janeiro

was governed by a Government agency, to wit, the Central Price Commission, at this time and was fixed. That is similar, I take it, to our OPA.

In his answer to Cross-Interrogatory No. 24, he says he believes the price was 137 cruzeiros per fifty kilo bag, and that relates back to his answer to direct Interrogatory No. 21, where he says without qualification that it was that much per bag, for this reason: In the first place, if the price is a matter of public record, fixed by the Central Price Commission, that is definitely the best evidence. Here where we are thousands of miles away and must rely on these depositions, I take it that we are entitled to be at least reasonably technical about these matters, because my cross-interrogatory asks for a copy of the record or published price list, and the witness has failed to furnish that. [96]

His answer is, "I believe" it was so and so. He is testifying almost four years after this date of March, 1946, and to permit to stand in a deposition as testimony the fact that he believes it was so and so, when it is shown by his own testimony that it is a fixed price by a Government agency, and where I asked for a copy of it, I think is entirely improper, incompetent and prejudicial to the respondent's case. We can't cross-examine his recollection, and where it is shown by his own statement that there is a record of it, to wit, the Central Price Commission having fixed it, I take it that should be stricken, that he believes it was 137 cruzeiros.

The Court: Has the libelant adopted any other means or method of proof on this issue?

Mr. Howard: This is the only sworn testimony on that, Your Honor. I will say this, that at an earlier stage in this proceeding, when certain interrogatories were propounded to us by Mr. Wakefield for answer on behalf of libelant, I answered at that time that the corresponding figure would be 126 cruzeiros.

The Court: The statement here is 137.

Mr. Howard: 137, yes, Your Honor. In answer to interrogatories, I had made the statement that, "Sound market value at Rio de Janeiro, duty paid, of each bag [97] of American wheat flour weighing 50 kg. as of date of discharge was Cruzeiros 126.00." I did not make that statement at that time on the basis of this witness' testimony; I made it on the basis of reports we secured from our correspondents at New York who advised us that was the sound market value.

The Court: And this is at variance with that statement?

Mr. Howard: To the extent of 11 cruzeiros. I am willing, if counsel objects to this, to limit my proof on damages to the statement I previously made on answers to interrogatories, namely, 126 cruzeiros. Neither one of us knew of this answer until this deposition was received, as of Monday, a week ago today.

The Court: Have you any objection to the proposal made by Mr. Howard? Do you object to his doing so in view of the surprise answer, surprise not only to you but to Mr. Howard? Mr. Howard

should be entitled to have some proof of the allegation, and if he in good faith relied upon this as being some evidence of the allegation before opening this deposition, you can plainly see the disadvantage, can you not?

Mr. Wakefield: Definitely.

The Court: Otherwise, he might say, "I ask a continuance of the trial for the purpose of getting other [98] testimony on this matter of selling price." I do not know that his request to that effect would be granted, but you can see what position he might be put in.

Mr. Wakefield: I realize that. That is why we had the continuance before, so he could get this testimony, but it is his burden of proof to prove market value or landed value or invoice value.

The Court: Have you any information which makes you believe that it would be injurious to the best interests of your client to make admission that the price was as stated in his client's answer to your interrogatory?

Mr. Wakefield: The only thing I can answer to that, Your Honor, is that I don't know. I haven't any idea what the price is.

The Court: For the purpose of the case, what is your attitude?

Mr. Wakefield: My attitude is that it is his burden of proof, and he had a continuance from Your Honor once; now he is back here without adequate proof the second time.

Mr. Howard: Will Your Honor hear from libel-

ant as far as the objection made to this and the motion to strike as to these interrogatories?

The Court: When do you want to be heard?

Mr. Howard: Right now.

Mr. Wakefield: May I make one more statement? Mr. Crutcher called my attention to the fact that in answer to direct interrogatory No. 21, which is the one I am objecting to, coupled with cross-interrogatory No. 24, he said, "According to our records the selling price" was so and so. Then I asked him to produce those records and he said that the price was fixed by the Central Price Commission, and then he said he thinks it was 137 cruzeiros. He was given the opportunity to produce records.

The Court: But he said he couldn't do it, and I am not so sure but what he would not be permitted to state his best recollection of what the records show in that case, unless you have evidence that his answer that he couldn't produce the record was a dishonest answer. Is that your position?

Mr. Howard: That is part of it, that the libelant through his representative is entitled to state what the market value of a commodity is at any particular place. It is not necessary, as counsel has suggested, to bring in an official record in order to prove it. The courts have held many times that a suing party may prove the value of a commodity or an article by testimony of his own people as to the value. [100]

The Court: Is this man an officer?

Mr. Howard: He is an accountant for the libelant corporation.

The Court: Is he their regular accountant? Do you know how many they have?

Mr. Howard: It would appear from the answers he has already given in this deposition that he has been an accountant since 1940 or 1941.

The Court: Is he their chief accountant, the one in charge of their accounting department?

Mr. Howard: It does not state definitely one way or the other. It is my impression that he was.

As to the proof of the value, he was asked to furnish a copy of the record or public price list. He has previously said that the price was fixed by the Central Price Commission. Counsel criticizes his answer because he didn't furnish a copy of that record. It seems logical to me that the witness wouldn't have available to him a copy of that record, particularly when he is called upon to testify on written interrogatories, to go to the American Consulate at Rio de Janeiro. He may not have had it with him, may not have anticipated need for such a record, and there may not have been any record he could possibly obtain on it.

He has testified not once but twice in this [101] deposition that the value was 137 cruzeiros. It seems to me the fact that we are calling on this witness many thousands of miles away in a foreign country to testify on written interrogatories entitles some liberality rather than some strict technical interpretation of the rules as far as proof and the particular question of evidentiary value involved in the motion to strike these answers. This being an admiralty

proceeding, I think all those things should be considered. If there is any question in the Court's mind, it seems to me it should be resolved in favor of the witness, who has not once but twice given an answer as to the question of value.

The Court: Mr. Wakefield?

Mr. Wakefield: I would say this, Your Honor. What Mr. Howard says is his dilemma applies to me also. I would like to cross-examine this man.

Your Honor has had experience in cases involving the OPA. You would not permit a witness on the stand to say what the OPA price was on a certain commodity, and that is just what this fellow has done, only he doesn't even do that. His testimony is, "I believe the price to have been 137."

Now, when it comes to landed price, he has put down here in great detail all of the items making up the landed cost, including the delivery to the mill and [102] everything else, and he comes up with 98.25 cruzeiros as the landed cost, and he breaks it all down, which is taken from their records. I do not object to that price because that in my opinion is properly proven, and if counsel wants to rely on that price it is all right, but in justice to my client I can't say that I will admit it was 137 cruzeiros, I will admit it was 126 cruzeiros.

I submit that if he has not proven it in the manner in which the law says he should prove it, by the best evidence or credible evidence, that Your Honor should not receive it. I think Your Honor can receive the landed cost, because that is proven from their records in detail.

The Court: Is the landed cost in this same witness' deposition?

Mr. Crutcher: Yes, Your Honor.

The Court: In answer to interrogatory No. 22, is that right?

Mr. Crutcher: That is correct.

The Court: I have an opinion upon this, but I will hear from Mr. Crutcher.

Mr. Crutcher: Your Honor, I would like to add one additional thought. I would like to point out that these interrogatories were discussed with Mr. Herold some months before the formal interrogation began, and [103] it was no doubt in anticipation of that that he provided the detailed data which went to make up this landed cost. He also said on direct interrogatories that he got the market price, that is, the fixed Government price, from his records, and it seems preposterous that in doing so and being apprized of the necessity for producing them he did not bring the record of value as well as the record of landed cost.

The Court: I think that the witness in cross-examination has justified the Court's permitting the answer to stand. I think he has made a technical qualification for the application of secondary evidence in lieu of the best. He stated on direct examination the record information, and then on cross-examination by written interrogatories, just the same form as the direct examination was in, that while he did not have the records with him, he believed what he now says and in effect what he

previously said in his direct examination. I believe that that raises to admissibility the secondary evidence, namely, his recollection of what the record showed, and that I believe is a technical qualification for the answer.

However, I believe also that the circumstances of this being a deposition taken upon written interrogatories in a foreign country, and it being in an admiralty case, [104] that the strictest rigidity of the best evidence rule should not here be applied. After all, this deposition is taken upon written interrogatories; it is not taken on oral. If counsel on either side desire to cross-examine this witness' qualifications for stating the secondary evidence, they had a right to take his deposition by oral interrogatories instead of written, if they wished to do so. Both sides elected to take the deposition upon written interrogatories, and I do not believe there should be applied to this situation the same rigid requirement as to secondary evidence which we might feel that it was appropriate to apply if the witness was on the stand being cross-examined, or if he had been then and there upon the stand subject to oral examination.

The objection is overruled.

DEPOSITION OF FREDERICK HEROLD

Cross-Examination

(Continued)

“Cross-Interrogatory No. 25: To whom did Companhia Luz Stearica sell its flour in March, 1946?

(Deposition of Frederick Herold.)

Twenty-Fifth—To the Twenty-Fifth Cross-Interrogatory He Says:

To many different bakers. Our customers total several hundred since we supply flour not merely to Rio de Janeiro but throughout Brazil. We ship to agents and representatives in the interior and in the north of Brazil.

Cross-Interrogatory No. 26: On what basis was such [105] flour sold as to the size of sacks, the brand or other basis of sale?

Twenty-Sixth—To the Twenty-Sixth Cross-Interrogatory He Says:

Normally, for manufactured flour, our standard weight is fifty kilo bags though we have also sold in twenty-five and five kilo bags, and one kilo bags for household use. In the case of imported flour, we sell according to the weights of such bags which may be seventy kilo, fifty kilo, or hundred pounds, English weight. In other words, we sell them as we receive them, as we are permitted to do.

Cross-Interrogatory No. 27: What was the actual selling price per sack of flour as is involved in this action and which was not damaged?

Twenty-Seventh—To the Twenty-Seventh Cross-Interrogatory He Says:

137 cruzeiros per bag.

Cross-Interrogatory No. 28: How does this price compare with the landed cost to the company at Rio de Janeiro?

Twenty-Eighth—To the Twenty-Eighth Cross-Interrogatory He Says:

(Deposition of Frederick Herold.)

The landed cost of this ship was Cr \$98.2594.

Cross-Interrogatory No. 29: Was there a strong demand for wheat flour in Rio de Janeiro in March, 1946?

Twenty-Ninth—To the Twenty-Ninth Cross-Interrogatory He Says:

I think so.

Cross-Interrogatory No. 30: Was the price higher or lower than normal? [106]

Thirtieth—To the Thirtieth Cross-Interrogatory He Says:

During my period with the company I have seen flour go from fifty cruzeiros a bag to about 260 or 270 cruzeiros. The price at the time was fixed by a Central Price Commission, as it still is. The March, 1946, price was substantially lower than the present-day price."

The Court: Is that selling price?

Mr. Wakefield: The question does not state selling price or landed price. It must be the selling price.

The Court: The selling price to the consignee at Rio de Janeiro is 98.2594?

Mr. Wakefield: That is correct, Your Honor.

The Court: It is the same figure that was given in his direct examination, is it not?

Mr. Wakefield: Yes, Your Honor.

"Cross-Interrogatory No. 31: Was there an adequate supply of wheat flour, or was there a scarcity at this time—March, 1946?

(Deposition of Frederick Herold.)

Thirty-First—To the Thirty-First Cross-Interrogatory He Says:

During the past three of four years supplies of wheat flour have been less than normal compared to the period prior to the war. On several occasions we have been entirely without stocks of wheat, as opposed to wheat flour. I cannot [107] recall the exact situation at this time, March, 1946.”

Mr. Howard: That concludes the deposition of Mr. Herold. Libelant offers that in evidence.

The Court: It is received as part of libelant’s case in chief.

I will have to excuse counsel until tomorrow morning following the term day proceedings, substantially 10 o’clock. Court is adjourned until tomorrow morning at 10 o’clock.

(At 4:15 o’clock p.m., Monday, October 31, 1949, proceedings recessed until 10 o’clock a.m., Tuesday, November 1, 1949.)

November 1, 1949

The Court: You may resume the trial proceedings.

Mr. Howard: At this point libelant rests its case in chief.

The Court: Libelant rests. The respondent may now proceed.

Mr. Wakefield: If the Court please, I won’t belabor [108] the point, but for the record on behalf of respondent United States I would like at this

time to challenge the sufficiency of the libelant's evidence with respect to, first, proof that damage was done by the respondent; and secondly, with respect to sufficiency of any proof as to the extent of damage; and third, as to the sufficiency of proof offered as to the value of any damage which may have been proven.

We feel that libelant has failed to make out a case and that the Court should make a determination in favor of respondent on libelant's testimony.

The Court: The challenge is overruled and the motion is denied.

Mr. Wakefield: The respondent at this time will call as its first witness Howard Francis Lane, master of the Sweepstakes, who testified by deposition.

DEPOSITION OF HOWARD FRANCIS LANE

(Mr. Prem appearing for libelant, Mr. Lord appearing for respondent.)

"Direct Examination

By Mr. Lord:

Q. Captain Lane, are you now staff captain of the Steamship Brazil? A. Yes, sir.

Q. Do you expect to leave the Port of New York on [109] Friday, October 8th?

A. That is right.

Q. Were you master of the Steamship Sweepstakes on a voyage from New York to South American ports beginning in February, 1946?

A. That is true.

(Deposition of Howard Francis Lane.)

Q. When did you first join the Sweepstakes?

A. I was on the Sweepstakes during the war. That was around 1944.

Q. Did you sail on her as master?

A. I sailed on her as master at that time.

Q. What type of vessel was the Sweepstakes?

A. The Sweepstakes was a C-2, SJ-1, or a Wilmington, North Carolina, built C-2, which varies from the West Coast, Moore-McCormack type, San Francisco built C-2.

Q. How many hatches did she have?

A. Five hatches.

Q. How many decks?

A. An upper tween deck and a lower tween deck and a main lower hold.

Q. Were there any deep tanks?

A. Deep tanks for carriage of oil were never completed but the framing of the deep tanks was situated in the No. 2 lower hold.

Q. Were there deep tanks elsewhere? [110]

A. No other deep tanks.

Q. What type of ventilating equipment did this vessel have?

A. Blower system for intake and also for exhaust.

Q. No cowl type ventilators?

A. No cowl type. The intake and exhaust were situated on top of the king posts.

Q. You mentioned, captain, that you joined the Sweepstakes in 1944 as I understood?

(Deposition of Howard Francis Lane.)

A. Yes.

Q. To skip over your early time on the Sweepstakes, captain, what voyage did this vessel make immediately prior to the voyage in question?

A. Prior to the South American trip we made a voyage to Marseilles, France, from New York with a full load of sugar for the Army. From Marseilles we went to Naples, Italy. At Naples, Italy, we loaded the war equipment of the Brazilian Expeditionary Force to bring to Rio de Janeiro.

Q. Did you have any claims for damage for the sugar?"

Mr. Howard: At this point I object to that question. It is a question directed to the master of this vessel, interrogating him as to claims for damage for sugar carried on a previous voyage. I submit whether or not they had any claims for damage on a previous voyage had [111] no bearing on the claim made by libelant in the present case. Before Your Honor rules on that, I would like an opportunity to cite authorities I have on that question.

Mr. Wakefield: If this were a case where the damage to this flour was discovered upon discharge from the vessel, so that there was no issue in this case but that the damage did occur on the ship, we would have a different situation, but here is a case where the flour is discharged, no one sees any damage, no damage is noted until ten days after the discharge has been completed, and a respondent in that position is entitled, in my opinion, to show all the facts.

(Deposition of Howard Francis Lane.)

True, the weight of this testimony in Your Honor's mind may not be very great, but what we come before Your Honor with is a showing of all facts. As this deposition proceeds, you will see we have tried to show the whole picture to enable the Court to determine whether there was any possibility or probability of even remote cause or probable cause of damage on this voyage.

I think that it is relevant to the extent that the Court wishes to give weight to it, because we are put to it to show the impossibility of any such damage, or the unlikelihood of any such damage, because we had none on the voyage in question, none on the preceding voyage, none on the subsequent voyage, no repairs were made to [112] the ship, the ventilators were on top of the king post, and we are trying to show the whole picture. To that extent, I think it is proper.

The Court: It would be helpful to the Court if I had some authorities in support of your position, Mr. Wakefield.

Mr. Wakefield: I didn't consider that the issue would be raised, Your Honor. I am not here prepared to argue something that I did not anticipate.

The Court: The Court sustains the objection. You will have to pass the questions and answers which relate to that point.

Mr. Wakefield: I make an offer of proof with respect to the evidence——

The Court: You may do that now.

(Deposition of Howard Francis Lane.)

Mr. Wakefield: ——which Your Honor has excluded, and that will include the reading of the next question.

The Court: You may do that.

Mr. Wakefield: “Q. Did you observe the condition of the cargo at Marseilles?”

Mr. Howard: Same objection, Your Honor.

The Court: I think you should state in your words the substance of what you wish to prove, rather than reading the questions and answers. Otherwise, by reading the questions and answers, you might get the same evidence [113] in the Court’s mind. I do not think it is necessary for the Court to hear the questions and answers. You can say what you offer to prove by this witness, if you wish. One way to get at it, I suggest, would be, “I offer to prove by the questions and answers,” from certain lines to certain lines, in substance, that so and so——

Mr. Wakefield: Under that admonition of the Court, I offer to prove by this witness and the questions and answers contained in the deposition that on this voyage to which the witness is testifying, being the voyage immediately preceding the voyage on which the alleged damage occurred, that the vessel discharged its cargo at Marseilles, France, in 100% condition; that there was no loss or damage on account of sweat or water damage; and that on this voyage there was no evidence of any leaking of the hull or deck plates in any respect.

(Deposition of Howard Francis Lane.)

The Court: I will say this, Mr. Wakefield, that if you find during the noon hour that you have some authority to support your position, I will interrupt the proceedings to hear that, and Mr. Howard may be ready to offer countervailing authorities in support of his position in that event.

Mr. Wakefield: There is one question——

The Court: I understand there is an objection to your offer. [114]

Mr. Howard: Yes, Your Honor. My objection to the offer will be the same as previously expressed to the question.

The Court: The objection is sustained.

Mr. Wakefield: There is one question which is framed with respect to the prior voyage, but the answer has to do with the characteristic of the vessel as such and is therefore, in my opinion, quite material. I will read the question and answer.

“Q. During that voyage, was there any evidence of the vessel leaking from the hull or deck plates?

“A. No.”

Mr. Howard: I object to counsel reading that question and answer. I think the objection I previously made and the Court's ruling extends to that question, and particularly the answer to it.

The Court: Unless you have something else to offer on this point that you did not on the other, the Court is ready to rule on it.

Mr. Wakefield: The answer pertains to the characteristics of the vessel as a ship, not the voyage or any voyage.

(Deposition of Howard Francis Lane.)

Mr. Howard: I am willing to stipulate with counsel that the vessel was a fully welded vessel.

Mr. Wakefield: That is the point, if counsel agrees [115] then we can pass that. It was a fully welded vessel with no rivets.

“Q. Did this ship have hatch boards?

A. It has hatch boards in the upper and lower tween deck and the upper deck has pontoons.

Q. How are these pontoons handled?

A. In the No. 1 hatch we had eight steel pontoons which were lifted out by the cargo gear.

Q. What cargo did you carry from Naples?”

Mr. Howard: My objection runs to that question and the following questions dealing with the previous voyage.

Mr. Wakefield: In connection with my offer, I offer to prove by this witness, in addition, that on the voyage from Naples to Rio de Janeiro, being the immediately preceding voyage, the vessel carried a full cargo of military supplies, food stuffs, a full cargo, and that there was no damage to any cargo on that voyage.

Mr. Howard: I object to that offer of proof.

The Court: The objection is sustained.

“Q. Where did you proceed from Rio after that?” [116]

Mr. Howard: I object to that question. It still relates to the preceding voyage. My objection extends through the top of page 6, counsel, down through the sixth line.

(Deposition of Howard Francis Lane.)

Mr. Wakefield: If the Court please, this immediate question here, "Where did you proceed from Rio after that"—he answers where the vessel went and what it carried. The answer does not have anything to do with damage. He doesn't speak of damage.

I take it that if we came into this court and failed to offer such proof of prior voyages, or where we had been and what we had done, the Court could draw an inference that we were concealing something. Now we come in and offer to show the whole story and counsel objects to that. I think it is probative value for the Court to consider the history of this ship. Maybe she stranded on a voyage, maybe she encountered some difficulties which would enlighten the Court as to whether there was a probability of difficulty on the current voyage, and that is what that question is offered for. I submit that this question is not objectionable, nothing being said about damage.

Mr. Howard: My objection particularly extends, if the Court please, to the question following that, on the last line of page 5, but I believe the objection also [117] has the same merits as far as the preliminary questions which counsel has just read.

The Court: My thinking on this question is along this line: The vessel might have been ever so staunch, strong and tight on the voyage which immediately preceded arrival at the port where she took on the cargo in question, but within a mile of

(Deposition of Howard Francis Lane.)

such port arrival she might have run on rocks and sprung some leaks. Anything like that is in the realm of possibility, and it seems to me it is not proof. It is a question of what was her condition at the time of her loading this cargo and thereafter.

Mr. Wakefield: We will show in this deposition that she didn't run on any rocks at any time. We are covering more than the current voyage, because of giving the Court the opportunity to see the entire picture.

The Court: The objection is sustained.

Mr. Wakefield: I offer to prove by this witness that after discharging the cargo at Rio which came from Naples, the vessel then went to Buenos Aires, loaded wool and hides; went to Montevideo, loaded more wool; then to Santos and loaded coffee; then to Rio and loaded more coffee; stopped at Trinidad for fuel oil; then proceeded to the United States, North Atlantic ports including Boston and New York; and that during the course [118] of this northbound voyage there was no evidence of leakage in the vessel, no damage to any cargo.

Mr. Howard: I object to that offer of proof on the grounds heretofore stated.

The Court: Sustained. Counsel again on this point are invited to during the noon hour assemble any authorities which will support their respective positions and call them to the Court's attention.

"Q. After you discharged your northbound

(Deposition of Howard Francis Lane.)

cargo, captain, what if anything was then done to the Sweepstakes?

A. Due to the tween decks at the time being obstructed with padeyes, cleats, chain lashings with turnbuckles attached, and cribbing for carrying fuses for bombs, these were all removed at the conclusion of that voyage. The vessel was outfitted with new tarpaulins and all the war equipment was removed from the ship. There was a conversion from the original wartime category back to its peace time pursuits.

Q. To the best of your recollection when were these repairs and alterations completed?

A. Roughly December of 1945.

Q. Was there a voyage between December, 1945, captain, and the voyage in question?

A. No. [119]

Q. Now, you mentioned new tarpaulins, captain. How many tarpaulins were supplied for each hatch?

A. The law requires three for each hatch and there were three for each hatch.

Q. Was any damage to the northbound cargo called to your attention, captain, on the previous voyage?"

Mr. Howard: I object to that question and the following question on page 7 for the same reason heretofore stated relating to previous voyages.

Mr. Wakefield: The offer, Your Honor, is merely to prove by this witness that there was no damage to cargo by leakage or water on this northbound voyage and that the cargo was discharged.

(Deposition of Howard Francis Lane.)

Mr. Howard: The objection heretofore stated applies to these questions.

The Court: Sustained.

“Q. At the time of the repairs to remove from the vessel the cleats and other war gear that you spoke of, did you at that time make an inspection of the ship?

A. At the time it was necessary because I was the one that fought to have it removed because with the coffee trade, with all these obstructions in the holds, it caused damage to the coffee bags.

Q. Did you make an inspection after the completion of [120] the repairs?

A. Yes. That was taken care of with the port engineer.

Q. Did you at that time form any opinion of the condition of the vessel for carrying cargo?

A. The vessel was put back in practically the original condition she was in before and that was for the carriage of general cargo, all except the deep tanks which were never completed.

Q. Do you recall, captain, when you commenced to load cargo at New York on the next southbound voyage?

A. In February of 1946.

Q. Do you recall without referring to your log book the exact date when you commenced to load?

A. I can't remember back that far, no, sir.

Q. I show you a document, captain, which is called “deck log book, SS Sweepstakes, commencing January 28, 1946, ending May 25, 1946,” and ask

(Deposition of Howard Francis Lane.)

you if you will describe what this book is (handing to witness)?

A. That is the rough log book of the vessel. It is part of voyage 12. It is not the complete voyage."

Mr. Wakefield: At this time, if the Court please, I merely exhibit to the Court this log book, which I will not at this time request to be marked unless the deposition requires it and counsel wants it. The point is, I [121] do not think it is material.

The Court: Let counsel see the part of the log book which you expect to call to the Court's attention.

Mr. Wakefield: I do not think I expect to call it to the Court's attention, Your Honor.

Mr. Howard: I am willing to proceed, Your Honor, and examine the log book during the noon hour, if necessary.

"Q. That covers the southbound voyage?

A. That covers the southbound and northbound but it does not cover a complete voyage.

Q. How is that log prepared?

A. That is a copy. This is the smooth log book here, I have to make that correction. The rough log book is on the ship. This is a copy of the rough log.

Q. Yes. Is it a general practice in your business to keep both a smooth and a rough log?

A. It is necessary and required.

Q. Now, captain, are the original entries from which the smooth log book is prepared made by the officers on watch?

A. Yes, sir.

(Deposition of Howard Francis Lane.)

Q. And from time to time are these entries typed into the smooth log by the chief officer?

A. The smooth log is kept by the ship's purser and it [122] is a copy of the rough log.

Q. Does your signature appear on these pages of this log book, captain?

A. The smooth log is signed by my signature, yes, sir.

Q. Now, referring to this log book, captain, can you refresh your recollection as to when the vessel commenced to load the southbound cargo?

A. Yes (examining book). This log does not start with the commencement. I guess the first day of this is the 28th of January.

Q. Some time prior to that loading started?

A. The first page, it says there were gangs of stevedores loading already.

Mr. Lord: I would like to have this marked Respondent's Exhibit A for identification, subject to the designation being changed in the event other depositions have been taken and exhibits offered by the respondent.

(Log book marked for identification Respondent's Exhibit A, 10/6/48, HH.)"

Mr. Wakefield: Your Honor, perhaps I had better have this marked for identification at this time.

The Court: Is that the same one you mentioned a moment ago? [123]

Mr. Wakefield: Yes, Your Honor.

(Deposition of Howard Francis Lane.)

The Court: Let it be marked Respondent's Exhibit A-1, unless you suggest something that is more appropriate as an identification number.

(Log book marked Respondent's Exhibit A-1 for Identification.)

"By Mr. Lord:

Q. Now, prior to the loading of the cargo at New York did you, captain, yourself inspect the cargo holds?

A. I did not inspect the cargo holds. The chief officer and the chief engineer inspected the cargo holds prior to loading.

Q. Did you inspect the holds to determine what if any dunnage was used prior to the time that the cargo actually came aboard?

A. All I could see was what I could see from the deck. The chief officer was in entire charge of the cargo. He inspected it.

Q. Could you see from the deck the dunnage that was laid in the upper and lower tween decks?

A. You could see that the dunnage was laid from the lower hold and lower tween decks.

Q. Do you remember, captain, what the dunnage consisted of on the floors of the upper tween decks?

A. I recollect this shipment that is in question because [124] of its being a priority cargo, being flour, three layers of dunnage was utilized plus paper to protect the bagging.

Q. You mentioned the term "priority cargo." Will you explain that for us?

(Deposition of Howard Francis Lane.)

A. Due to the shortage of flour in South America this cargo was loaded last, was loaded in the square of the hatches for immediate discharge.

Q. So that as far as possible you gave this particular cargo preferred stowage?

A. This particular cargo was given preferred stowage, otherwise it wouldn't be in the square of the hatch for immediate discharge.

Q. Now, you mentioned three thicknesses of dunnage. Was that criss-cross dunnage?

A. The usual practice is that the lower layer is laid fore and aft with drainage toward the scuppers; the second layer was thwartships, and the top layer fore and aft again."

* * *

"Q. And in this instance you observed the dunnage to be so? [125]

A. Yes, because I personally put in for the cargo paper to protect the cargo bags; I personally made the complaint to the stevedore to have cargo paper, and the cargo paper was laid to protect the bags.

Q. Where was that paper laid?

A. It was laid on top of the third layer of dunnage.

Q. Did you have cargo paper elsewhere in the tween decks?

A. Wherever the flour was stowed against the battens of the tween decks, as it was in No. 1, cargo paper was put against the cargo battens to protect the bags.

(Deposition of Howard Francis Lane.)

Q. Did you have any exposed stringers or longitudinals in any compartment?

A. Cargo battens covered all the longitudinals and stringers. The only defect in the cargo battens was the steel bolts that came through which would cause damage to a cargo of flour.

Q. Is that the reason they were covered?

A. That is the reason paper was utilized and dunnage where necessary.

Q. Were there any other metal surfaces that were exposed to cargo in stow?

A. Not in that type of vessel, no, sir.

Q. Captain, were you on board the Sweepstakes during the period of loading in New York? [126]

The Witness: Not every day, no, sir.

By Mr. Lord:

Q. Captain, during the loading of the vessel did you inspect any of the cargo that came aboard yourself? A. No, sir.

Q. You then know nothing of your own knowledge as to its condition.

A. I know nothing of its condition outside of what the chief officer signed, and the tally clerks and the surveyors on the pier noted, and that is given to us as exceptions, and the exceptions are made on the bills of lading.

Q. Such exceptions relate to the external condition of the cargo? A. Yes, sir.

Q. To your knowledge were any inspections

(Deposition of Howard Francis Lane.)

made which would necessitate the opening of bags of flour?

* * *

The Witness: No, sir.

By Mr. Lord:

Q. Do you keep records, captain, as to where the cargo [127] is stowed on your vessel?

A. Yes. The cargo plan denotes all the stowage of cargo.

Q. I show you a document or a large sheet of paper and ask you if you will identify this for us? (handing document to witness)

A. This is the cargo plan of the SS Sweepstakes, voyage 12.

Q. Voyage 12 is the one that you described as leaving New York in February, 1946, is that correct?

A. That is correct.

Q. Do you recall of your own knowledge, without consulting the cargo plan, where the Rio flour was stowed?

A. No. 1 tween decks, No. 2 tween decks, No. 3 tween decks, No. 4 upper tween deck and lower tween deck. That is roughly.

Q. Would this plan, Captain, show the stowage of the Rio cargo?

A. Yes, sir. It would show the stowage of all the cargo for all the ports.

Q. Is this plan prepared in the usual course of business of the vessel as a common carrier?

A. That is the typical plan and the usual plan we use.

(Deposition of Howard Francis Lane.)

Mr. Lord: I offer this as Respondent's Exhibit B for identification.

(Cargo plan was marked for identification Respondent's Exhibit B, 10/6/48, HH.)"

Mr. Wakefield: I ask that this cargo plan be marked for identification as Respondent's Exhibit A-2. It bears the identification of Respondent's Exhibit B, 10/6/48, HH, in connection with the deposition.

(Cargo plan marked Respondent's Exhibit A-2 for Identification.)

"By Mr. Lord:

Q. Captain, will you kindly consult the log book and look at the entries which appear in it, covering so much of the period of loading as is in that log book, and tell us whether or not there is any reference in the log to rain?"

Mr. Howard: Counsel, I would suggest that the log book be offered in evidence before the witness is allowed to testify from it. I have no objection to admitting the log book.

Mr. Wakefield: Counsel has asked that the log book be put in evidence, so I now offer Respondent's Exhibit A-1.

Mr. Howard: No objection.

The Court: Admitted.

(Respondent's Exhibit A-1 received in evidence.)

The Court: Did counsel for libelant see the (Deposition of Howard Francis Lane.) cargo [129] plan, marked as Respondent's Exhibit A-2?

Mr. Howard: Yes, Your Honor, I have had an opportunity to examine it.

The Court: When, if at all, do you wish to offer that?

Mr. Wakefield: I will offer it at this time.

Mr. Howard: No objection.

The Court: Admitted.

(Respondent's Exhibit A-2 received in evidence.)

"A. January 30th it rained but that was after loading hours (consulting book). That is all I can see here.

Q. At what pier was the Sweepstakes during loading? A. Pier 32, North River.

Q. Is it customary, captain, to load dry cargo during rain?

A. It depends on the type of cargo. Heavy machine case goods, we load in light rain.

Q. Do you recall, captain, of your own knowledge whether there was any rain while you were aboard the Sweepstakes during the period of loading? A. That I don't remember.

Q. While loading such machinery as you described during the light rain, captain, is it the practice to rig up any protection for the hatches during that period? [130]

(Deposition of Howard Francis Lane.)

A. They have the hatch tents which they use for coverage and protection of open hatches, and the slings as they come aboard, the pallets, have a canvas top over the cargo as it leaves the pier for the ship. That is the practice in most steamship companies.

Q. Where are the scuppers located in the tween decks?

A. In the aft end of the tween decks of the forward hatches, and the forward end of the tween decks in the aft hatches.

Q. You what are ordinarily described as bilges on these vessels, is that right?

A. They have no bilges. They are wells.

Q. Are these longitudinal?

A. They are thwartships.

Q. How deep are these wells, captain?

A. Roughly the depth of the double bottom tanks. Let us say a well is 40 inches deep—not quite that depth because there is concrete in the bottom.

Q. Captain, do you remember what kind of a voyage you experienced after you left New York until the time you arrived at Rio?

A. A typical South American voyage such as I have experienced for the last eight years: Quiet, moderate breeze, moderate seas. The only damage that could ever occur would be from rain squalls.”

Mr. Howard: I move to strike the last sentence of the answer as not being responsive to the ques-

(Deposition of Howard Francis Lane.)

tion, which asked him the kind of voyage experienced from New York to Rio de Janeiro.

The Court: I understand that to refer to the weather. What do you understand to be the nature of the information sought by the inquiry?

Mr. Howard: I understand him to be referring to whether any damage could have been sustained to cargo carried abroad, or any damage to the vessel which would result in damage to the cargo aboard.

The Court: Anything relating to the voyage which would have any possible materiality in an inquiry as to damage to cargo, isn't that the subject matter of the inquiry?

Mr. Howard: On that basis, Your Honor, I withdraw my objection.

The Court: We will take the noon recess. Court will be recessed until 1:30. Counsel are excused until 2 o'clock.

(At 12:03 o'clock p.m., Tuesday, November 1, 1949, proceedings recessed until 2 o'clock p.m., Tuesday, November 1, 1949.) [132]

November 1, 1949

The Court: You may proceed in the case on trial.

Mr. Wakefield: We will resume the reading of the deposition of Captain Lane.

DEPOSITION OF HOWARD LANE

Direct Examination

(Continued)

“Q. At the time you completed loading cargo in New York what was done with respect to the hatches?

A. The hatches were battened down, the tarpaulins put in place, and strongbacks put across the tarpaulins. All cargo gear booms lowered; blowers put in operation for the ventilation of cargo.

Q. Did you stop at any ports on your voyage to Rio?

A. We stopped at Trinidad for fuel bunkers and also to discharge mail.

Q. Do you remember the date of that, captain?

A. Not offhand. I would have to revert back to the log book.

Q. Will you do so, please?

A. Yes (consulting book). Arrived the 9th of February at Trinidad.

Q. Was that after you took bunkers? [133]

A. No, that is prior. We arrived on the 9th of February. Then the vessel discharged mail, and took bunkers.

Q. Will you be good enough to refer to the entries in the log book for the 8th of February, captain?

A. Yes, sir.

Q. Are there any entries on that page about taking bunkers on the 8th of February?

A. No, the vessel is at sea on the 8th of Feb-

(Deposition of Howard Lane.)

ruary. The 9th the vessel arrived, bunkers was started; oil barge began pumping alongside 1125 on the night of February 9th.

Q. You arrived at anchorage, did you not, on the 8th of February?

A. No. The vessel arrived the 9th of February.

Q. All right. What hatches were opened to discharge mail, do you remember?

A. That I do not remember, no, sir.

Q. Does the log book indicate what kind of weather you had while in Trinidad on the 9th of February?

A. Yes, sir. The log book indicates wheather mostly cloudy, moderate easy breeze, moderate sea and swell.

Q. Is there any entry there relating to rain?

A. Rain, yes, sir. Frequent light rain falls during the 12 to 4 watch in the morning. I can make a statement, No. 5 hatch discharged 441 bags of mail; No. 5 hatch was opened in Trinidad. [134]

Q. You then sailed to Rio, captain?

A. We left the 9th of February at 2356 and sailed for Rio de Janeiro, yes, sir.

Q. On what date did you arrive?

A. (Consulting book). The 19th of February.

Q. Do you remember when cargo was discharged?

A. The 21st of February.

Q. That was when the discharge was commenced?

A. That is true, yes, sir.

Q. And when was that concluded?

(Deposition of Howard Lane.)

A. 1010 on the 25th of February.

Q. Are there any entries in the log book about rain during that period, captain?

A. 22nd of February it says all hatches being covered due to rain.

Q. Without quoting into the record, captain, all the entries that may be in the log book about rain, will you tell us what the general practice was in connection with covering the hatches?

* * *

By Mr. Lord:

Q. What was the general practice, captain?

A. The general practice, in heavy rain it is necessary to cover the hatches where we have perishable cargo underneath, and all officers understand that and that was the [135] practice.

Mr. Prem: I understand that what was actually done on that occasion you have no knowledge at this time.

The Witness: You mean on this occasion when it rained that evening?

Mr. Prem: Yes.

The Witness: That I could not state, no, sir.

Q. (By Mr. Lord): Upon reading the entries in the log book would your memory be refreshed as to what occurred during the Rio discharge?

A. Yes, sir. It will be necessary to read the log book to remember what happened over two years ago.

Q. And in so doing would your memory be re-

(Deposition of Howard Lane.)

freshed so that you could testify as of your own knowledge? A. It will be necessary, yes, sir.

Q. When the Rio flour was discharged at what berth were you, do you recall?

A. It was in Berth 2. That is the deep water berth for perishable cargo.

Q. Were those bags discharged on to a pier or on to lighters?

A. No, being a priority cargo it was passed through customs and loaded on flat cars. Customs tallied the cargo as it went into the open flat cars. That I observed myself. [136]

Q. Will you describe these flat cars for us, captain?

A. An open flat car about 30 feet long, about four to five feet high, as used in the docks at Rio de Janeiro.

Q. Are those what you would call closed or open cars?

A. An open car similar to the American type of flat railroad car, only much shorter.

Q. Did you have occasion to observe the discharge of these bags of flour, captain?

A. I was not present at all times, no, sir. I was there when Mr. Caswell and the chief officer inspected No. 3 hatch. I left them at No. 3 hatch and they inspected the remainder of the hatches. That is Mr. Caswell's practice when Moore-McCormack ships arrive at Rio de Janeiro."

Mr. Howard: I move to strike that last part of

(Deposition of Howard Lane.)

the answer, since it appears the witness had no personal knowledge and therefore is in no position to state what other men may have done on that occasion.

The Court: Is it not developed on cross-examination or elsewhere?

Mr. Wakefield: Mr. Caswell is a witness and so is the chief mate, and they testified they inspected them, so I don't think it makes much difference.

The Court: It is stricken. [137]

“Q. What was the purpose of that inspection, do you know?

A. Mainly for pilferage, for finding if any pilferage existed which could be noted, and for sweat damage.

Q. If damage is found, is it customary to make reports?

A. The report is made immediately. Surveyors are called in immediately if the damage is excessive.

Q. In the ordinary practice of your business would that report be called to your attention?

A. That I would know about, yes, sir.

Q. Was any such report called to your attention in Rio?

A. I know of no report about sweat damage. I know of pilferage of cargo, not sweat damage.

Q. Do you know of any report about any other type of damage, water damage, being called to your attention?

(Deposition of Howard Lane.)

A. I know of no report of water damage.

Q. What are these reports called?

A. Mate's report of damaged cargo.

Q. And if such a report is prepared are you required in the general course of your business to sign these reports?

A. That is necessary before we forward them back to the claim department and the operating department in New York. That is to keep us informed of what cargo was damaged.

Q. And these reports cover all of the cargo that is observed to be damaged upon discharge of the vessel? [138]

A. That is true. They cover what is found on the dock damaged and also what is found aboard ship.

Q. Do you know whether or not there was any representative of the customs or dock administration at the ship's side when this cargo was discharged?

A. There was always a customs officer at the ship's side, but I have no knowledge he is concerned with the cargo of the vessel.

Q. In other words, captain, you take no interest in the cargo after it leaves the ship's tackle?

A. After the cargo leaves the ship our responsibility for its carriage ends.

Q. Do you know who it was that arranged for the flat cars to meet the ship's side?

A. I have no knowledge of shore operations.

(Deposition of Howard Lane.)

Q. Did you observe any damage whatever to any bags of flour discharged at Rio?

A. I know of no damage to any flour discharged at Rio.

Q. When you completed this southbound voyage, captain, did you make a subsequent trip on this vessel?

A. I made one more trip to South America, yes.

Q. I understand there are other ports of discharge than Rio, is that correct?

A. Yes. Buenos Aires, Santos and Montevideo.

Q. At these other discharge ports was any water damage [139] called to your attention?

A. I know of no water damage at the time being called to my attention.

Q. In the subsequent voyage what cargo did you carry then?"

Mr. Howard: I object to this question and the next three questions following on the same grounds as stated this morning; that is, that this now relates to a subsequent voyage and not the voyage in question. I submit that any evidence of cargo or damage if any that may have been sustained to cargo on a subsequent voyage would not be admissible for the same reason that evidence of damage on a prior voyage would not be admissible.

Mr. Wakefield: I think the distinction is self-evident, Your Honor. While it is conceivable on a prior voyage you might not find materiality as to conditions; certainly on the northbound voyage

of this same voyage and the next voyage, if there was no damage or no repairs were made to the ship, it would be very strong evidence that there was no damage on the voyage in question. It is directly related to the issue in this case, the subsequent voyage.

The Court: Does either side have any authorities they wish to submit in connection with the statement of [140] their position?

Mr. Howard: I have, Your Honor.

The Court: Do you have any Federal Court citations?

Mr. Howard: Yes, Your Honor, I have two Circuit Court cases, both admiralty cases.

The general rule is stated in 32 CJS, Evidence, at Sec. 583 as follows: "Thus, in the absence of a showing that the essential conditions were the same, an issue as to the existence or occurrence of a particular fact, condition, or event cannot be proved by evidence as to the existence or occurrence of other facts, conditions, or events, although they may be, in some respects, similar."

The first case I have is an admiralty case from the Fourth Circuit Court of Appeals, *The Richelieu* 1931 AMC 721, 48 F. (2d) 497. The court was concerned with an action involving an explosion and fire aboard a ship. The respondent shipowner sought to show it had loaded other products in previous years under the same conditions without mishap.

The Appellate Court held such evidence was not

admissible, and said in part as follows: "And the fact that no explosion resulted in the loading of coal is not conclusive that the methods employed were such as in the exercise of due care should have been used even there." [141] The court excluded such evidence of loading on previous voyages.

Another Federal case—this is a District Court case, I was mistaken in saying there were two Circuit Court cases—is *The Ensley City*, the District Court of Maryland, 71 F. Supp. 444. This is an action for damage to a cargo of licorice extract. In the trial of the case, the trial court excluded from the evidence records offered by the carrier to show temperatures in the holds on previous voyages to show there was no substantial damage from temperatures recorded in the voyage in question.

In that case, the decision of the court held that substantially similar conditions had not been shown to exist, and that too many other factors might affect the temperature readings; hence such evidence was not admissible.

I submit to Your Honor that those authorities and others non-admiralty in nature which might be quoted also justify the Court in sustaining the objection not only to evidence of conditions on prior voyages, but certainly for the same reason, evidence of conditions existing on subsequent voyages.

Mr. Wakefield: I think Mr. Howard's decisions

are not in point in any sense of the word. Those cases— [142] both of which I am very familiar with, because Your Honor will recall that in the Apex fish case we had the same question—both of those cases involved the issue of proper stowage, and so did the Apex fish case; namely, putting a certain commodity in a certain place in a certain way, and proof was offered to show that it had been done on other occasions in that same way without damage as tending to show that it was proper on the occasion in question.

That isn't what we have before us here at all. We have before us here alleged salt water damage to cargo while on board the ship, upon which the libelant has the burden of proof, and respondent in proving its case comes forward and shows that there was no such contamination on a prior voyage, that there were no conditions on the current voyage to account for it, and that on a subsequent voyage there was no salt water damage, and that the ship had not been repaired during that time.

In other words, this testimony that we offer here is related to the issue because the issue is, was this cargo damaged by salt water. That means leaky rivets or leaky hatch covers or some way that salt water got into this ship, so if we limited our testimony just to the voyage in question, then counsel in argument to Your Honor would say, "He doesn't show anything about the [143] subsequent voyages. Maybe this ship went back to New York and had

to repair her tanks, or maybe she repaired leaks in the deck," and we would be criticized for not showing the evidence I am now trying to show.

There is a vast difference between what counsel has cited, and I will admit, as the Ninth Circuit said in the case involving damage, that you might negligently stow cargo on five voyages and not have any damage, but the sixth time it might be damaged, so that successful carrying on previous voyages of cargo isn't evidence that it was not properly stowed. We don't offer it for that purpose. We are showing a continuous fact. The issue is, was this cargo damaged by salt water on this voyage. The captain has already testified that the voyage was a quiet, normal voyage, that nothing occurred on the voyage to account for any possibility of salt water.

The Court: What would be your position if Mr. Howard was trying to show that you did not make subsequent repairs?

Mr. Wakefield: I think that would be admissible.

This case before us now is what I call a circumstantial evidence case. There isn't any direct evidence on either side. You have an ultimate fact here that so many days after the cargo was discharged it was found [144] to be damaged.

The Court: I am frank to say to you gentlemen that it is surprising to me that it wouldn't occur to counsel to brief this question. Since you were taking this testimony by deposition, you must

have known in advance that this question was going to arise. I do not see how this point could escape your attention as one of the points you would want to brief. What is the use of leaving this question to be settled by an appellate court? If you gentlemen had this question briefed, we could settle it right here.

I tell you frankly that I am in a position to be benefited in my thinking by careful briefing of this point, on this question of whether the making or non-making of subsequent repairs, subsequent to the happening of an accident, may be shown as bearing upon the question of negligence.

Mr. Wakefield: There isn't any contention here that repairs were made.

The Court: What you are doing is offering evidence to show no change in the conditions, is that not right, to show that no change in the condition took place?

Mr. Wakefield: I think that is true.

The Court: You made no repairs and nobody suffered any damage, is that not what you seek to show as evidence [145] of the fact that nobody suffered damage on this case and the ship did not cause this damage?

Mr. Wakefield: That is correct.

I have one case I would like to mention. Of course, you cannot always find a case on all fours, but this is certainly of general application. It is the *Rangoon Maru*, by the Second Circuit, 27 F. (2d) 722.

In that case, there was damage to cargo, which was bleaching powder, and the claim was that that damage resulted from heat aboard the vessel, and libelant was contending that the bleaching powder was stowed in a hot hold. Testimony was admitted as to the character of the hold, by experts, and as to whether or not the stowage was proper.

The Court said, "Each person with practical experience in stowing bleaching powder who was called as a witness testified that the stowage which the Grace shipment received on the Rangoon Maru was not improper. It was passed by the New York Board of Underwriters and seems to have received all the consideration similar shipments usually receive. In other words, the stowage was according to the established custom and usage of trade at this port, and this is enough to rebut a charge of negligence in that regard."

This further statement of the Court I think is in point here: "Cocks, an experienced cargo surveyor called by the claimant, said that the estimated temperatures were exaggerated, and that the temperatures of the forward part of No. 3 and No. 4 'tween-decks would be generally the same. He added that the Rangoon Maru had safely carried in the forward end of No. 3 'tween-decks on her previous voyage dessicated cocoanut, a commodity that is damaged by excessive heat. Peterson also testified that the difference in temperature between No. 3 'tween-decks and No. 1 hold, which is claimed by libelant to have been the coolest part

of the ship, was about four to five degrees, and Dalton's testimony was that it was only five or six degrees. Cocks' estimate was apparently the same as Dalton's."

The Court further said: "A formidable array of witnesses experienced in stowage approved the stowage in question, and even libelant's surveyor Metcalfe made no criticism of the places of stowage. In such circumstances, the usage of the trade, and not the opinion of chemists, however sound, is the test." Citing cases. "The trade evidently thought that moisture, and not heat, was the danger. This was established by an overwhelming weight of evidence.

"In spite of the mass of testimony of skilled men that the stowage was customary and proper, we are asked [147] to declare it bad on inferences at best uncertain as to the temperatures in the ship's compartments, and on conflicting views of the experts as to what degree of heat causes disintegration. This we decline to do."

There was testimony of other voyages and expert opinion as to the character of this cargo space not on the voyage in question but on other voyages as bearing upon the correctness of the stowage on this voyage.

Here we are just showing a continuation of events; the voyage itself, on which there is no showing of salt water damage to any cargo, and then the return voyage, and then the next voyage, and we still have no evidence of leakage or repairs to

the ship to correct any leakage. That has strong probative value in a circumstantial evidence case of this kind.

Frankly, I do not know of any case directly in point. As I say, those of counsel's are not in point, either. My case of the Rangoon Maru is somewhat contrary to the one counsel reads, but rather than have anticipated an objection, it was my view that if I did not come forward with this kind of evidence, then counsel would claim I was covering up something because I wasn't showing what happened to this ship later on. He would be arguing "Maybe when they got back to New York they examined the ship, found this and that wrong and repaired it, therefore that would tend to show there was something wrong on this voyage." That is my only purpose in offering it, to bring before the Court all of the facts which have a direct bearing on the possibility of such damage.

The Court: You say you have no cases indicating that the rule is the same, Mr. Howard, respecting before and after the voyage in question, respecting introduction of evidence of conditions after as well as before, that such evidence is excluded?

Mr. Howard: No, Your Honor. The cases I cited related to the evidence of preceding voyages. I have examined the authorities trying to find such cases, and those were the only ones I could find in point.

The Court: Did you try to find cases concern-

ing the admissibility of evidence of conditions subsequent to the voyage in question?

Mr. Howard: I did on this question, yes.

The Court: Did you anticipate that this was coming up this afternoon?

Mr. Howard: Yes, Your Honor, and for that reason I had briefed this point, and these were the only authorities I could find involving shipments on vessels, that the question had been discussed. I submit to Your Honor that I can see no logical basis for any distinction [149] between subsequent voyages and prior voyages, and in fact, the Corpus Juris citation which I gave Your Honor, 32 CJS, puts them altogether in the same category, I believe.

Mr. Wakefield: Your Honor, let us suppose Mr. Howard by interrogatories of discovery had developed that upon return of this ship to New York, on the occasion of returning from this voyage, that the ship had been put into dry dock and they had to repair 10 or 12 leaky rivets or had to make some hull repairs. He would be offering that evidence as bearing upon the probability of the ship having leaks on the occasion of this voyage when the cargo was supposed to have been damaged, and I think it would be admissible, and by the same token, our showing that there were no such leaks or no repairs, no damage to other cargo on the subsequent voyage, is of the same probative value that that testimony would be.

I think this is somewhat similar to limitation of

liability cases where you have to prove all of the surrounding circumstances to show lack of knowledge, surveys of the vessel and conditions over a long period of time.

The Court: I suspect that if CJS said anything about admissibility of prior conditions, it will say something about admissibility of evidence of subsequent [150] conditions.

Mr. Howard: I couldn't recall anything on that, Your Honor.

The Court: Will you take CJS and see if you find any statement about subsequent conditions, Mr. Howard?

Mr. Howard: There is one section that has some slight bearing on it, I believe.

Sec. 585, "Continuing facts. The existence of a fact at a particular time may, under some circumstances, be shown by evidence of its existence at another time.

"Since there is a presumption, as shown supra § 124, of the continued existence of a fact or condition of a continuous nature, it follows that such a fact may, within the limits of relevancy, be shown to have existed at a particular time by proof of its existence at a prior time, and its existence at a subsequent time may be shown where the interval is short as compared with the natural permanent nature of the fact or condition in question. Likewise, the existence, at a particular time, of a fact or condition of a temporary nature may be proved by evidence of their existence at another time, pro-

vided it is shown that they did not change during the interval; but, in the absence of such a showing, the evidence is inadmissible.”

The Court: In that connection, is it your contention [151] that before any of this could be shown, either prior or subsequent conditions, that the detailed proof as to the similarity of conditions must first be established?

Mr. Howard: Yes, Your Honor. I think that is essential in the first place, and that was pointed out in this case that I cited to Your Honor, the District Court case. The Court held that substantially similar conditions had not been shown to exist, and that there were too many other factors that might affect the temperature readings.

I think the same could be applied equally as well on a subsequent voyage; there are too many other factors that might affect it, the weather encountered, the type of cargo, the nature of the voyage involved, the ports of call, and things of that nature. Certainly there is no similarity of conditions which, as indicated in this CJS citation and in this case, are necessary before any such evidence could be admitted.

Mr. Wakefield: Of course, I think the CJS statement Mr. Howard just read supports this testimony, because we are now talking about the return trip from South America back to——

Mr. Howard: I beg your pardon, counsel. My objection was not placed until your testimony finished the return voyage, until you started on the next voyage [152] southbound.

Mr. Wakefield: I hadn't gotten that far.

The Court: I understood that you had. "In the subsequent voyage what cargo did you carry then?" He commenced to object then. "General cargo, mainly machinery, tin plate. We also had flour for Santos," was the answer.

Mr. Howard: That was my understanding of the question and answer, it referred to the next subsequent voyage after the vessel returned to New York. The questions immediately preceding talked about cargo northbound from South America to New York, and I made no objection to that.

Mr. Wakefield: The question following says, "Did you load any cargo northbound after you completed discharge on the southbound voyage?" That is the one I am talking about.

The Court: The question preceding that is a subsequent voyage, and that must mean the northbound voyage, must it not?

Mr. Wakefield: That is what I took it to mean.

The Court: The question you are now speaking of is expressly so stated, and Mr. Howard objects to both questions, as I understand it, and did not object to any prior to the one on the subsequent voyage. Unless [153] you show me some authorities that authorize it, I am going to have to sustain the objection.

Mr. Wakefield: Even as to the northbound voyage?

The Court: Yes. I do not see any authorization for it in anything you have cited. I ask counsel to

give me the benefit of the authorities in the matter.

The objection is sustained.

Mr. Wakefield: In view of the Court's ruling, the respondent officers to prove by this witness that on the northbound voyage immediately following the discharge of the flour at Rio de Janeiro the ship called at Buenos Aires and Montevideo and loaded cargo consisting of hides and wool and casein, and coffee at Santos and Rio, and that this cargo was carried to New York where it was discharged, and that there was no damage to any cargo by reason of water or salt water on this immediately following northbound voyage of the vessel.

The Court: What is your attitude, Mr. Howard?

Mr. Howard: I would like to get counsel's offer of proof clear in my mind. As I understand, his offer of proof refers to the northbound voyage, the northbound leg of the voyage immediately after the voyage in which we have claimed damage to the shipment of flour.

Mr. Wakefield: That is correct.

Mr. Howard: I object to that in that it relates [154] to the subsequent voyage and not the voyage in question, for the same reasons heretofore stated.

The Court: Sustained. If counsel before the end of the trial can produce authorities indicating the Court's ruling is wrong, I will be glad to reconsider it.

DEPOSITION OF HOWARD LANE

Direct Examination

(Continued)

“ * * *

Q. Captain, have you recently looked through the bilge soundings shown in the deck log book for this voyage? A. Yes, sir.

Q. Can you describe what if anything they show?

A. Well, the normal bilge sounding for that type of vessel, very little change. The average would be about three, four inches for the soundings of the four holds.

Q. Are the sounding methods in all holds uniform, captain?

A. No. In No. 2 lower hold, being a deep tank, that was difficult.

Q. Why is that?

A. Due to the turns in the bilge sounding line as it was originally constructed to be an oil carrying deep tank and the lines were brought over close to the bulkhead so that they could be tapped off when oil was carried.

Q. What effect does that have on the bilge soundings?

A. It is difficult to get a sounding rod down there to [155] get a real accurate sounding of the bilge. When you draw up a sounding rod through a curved pipe it smears the water or whatever is in the well, all over the sounding line rod.

Q. Did you have any overflows in your bilge during this voyage?

(Deposition of Howard Lane.)

A. No. We had no overflows.

Q. Did you describe the voyage as rather a light one, captain. Did you take much water aboard?

A. Well, the ship was never loaded to capacity. All we would have is the spray, what you would normally get when bucking the trade winds from Trinidad up to Rio City.

Q. She was over her marks then?

A. No. She was under her marks. She had at least two feet free board with that amount of cargo.

Q. I should have said she was above her marks.

A. That is right.

Q. Will you say, captain, based on your own experience as a chief officer and master of ocean going vessels that the Sweepstakes was in all respects seaworthy and properly manned during this particular voyage?

Mr. Prem: I object to the question as leading."

Mr. Howard: I object to the question on the ground it is leading, and on the further ground that it calls for the opinion of the witness, which I believe is within [156] the province of the trier of the fact, as to whether or not the vessel was seaworthy and properly manned, on the basis of testimony as to those points which may be produced.

Mr. Wakefield: That is what we have been testifying to, if the Court please, as much as possible, all about the ship, her bilges, freeboard, the character of her hatches, new tarpaulins, all of the reconditioning of the ship immediately before this

(Deposition of Howard Lane.)

voyage, and the captain has testified to all that. Now he is asked his opinion based upon his testimony.

The Court: I am going to overrule the objection. It is so ordered.

“The Witness: Yes, sir, it was.

Cross-Examination

By Mr. Prem:

Q. Captain, do you have the practice on your ship when taking on cargo at New York to issue mate's receipts to the captains of lighters when they would bring their cargo to ship side?

A. No, sir. That wasn't taken care of on the ship, Mr. Prem.

Q. Do you know what receipts if any were given to the lighter captains? [157]

A. That is taken care of by the shore personnel.

Q. Do you as the chief officer know whether any other officer aboard the Sweepstakes gave any receipts to the lighter captains? A. No, sir.

Q. Did they give receipts to anyone else?

A. When cargo is received aboard the ship that they know of and it is labeled special cargo, receipts are given out.

Q. Were any mate's receipts issued on this voyage in question for the cargo of flour shipped by International Milling Company bearing marks CLS, Rio? A. No, sir.

Q. Have you any knowledge concerning the issuance of dock receipts such as I now show you?

(Deposition of Howard Lane.)

A. Yes, but that is the practice of Moore-McCormack. This cargo may have been on the dock for three days or a week before the ship got in there and they issued these receipts out to the people—the trucks, lighters or whoever the cargo was laid on the dock. Once the cargo is put aboard the ship it is carried on the ship, and these are tally receipts which are given to the chief officer for checking the manifest, and also checking against his cargo plan the stowage of this cargo and its marks.

Q. If any bags of flour were received on board your [158] ship water stained or caked what would be your procedure with relation to accepting them or rejecting them, and if accepting them what notation would you make and where?

A. Exceptions are made to the Claims Department through these mate's reports on damaged cargo which are sent out daily of cargo received in a damaged condition and exceptions noted.

Q. Would the ship keep any copies of those reports?

A. Those reports would be on the vessel, yes, sir.

Q. Do you have any personal knowledge at this time whether or not any such cargo was received on board the ship?

A. Of the total cargo?

Q. Yes, of the flour cargo?

A. Of the flour cargo I have no knowledge of that, no, sir.

Mr. Prem: I make demand for the production of all records in the custody of Moore-McCormack that

(Deposition of Howard Lane.)

deal with the condition of this libellant's shipments of flour on the SS. Sweepstakes."

Mr. Howard: Those were produced at my request on receipt of the deposition by Mr. Wakefield, what documents he claimed to have in his file at that time. "By Mr. Prem: [159]

Q. You have no personal knowledge, captain, of libellant's shipments of flour being received on board your vessel, I take it? A. No, sir.

Q. And so far as you are personally aware no sea water entered any of the stowage compartments where libellant's cargo was stowed on this voyage of the Sweepstakes commencing at New York in January of 1946 to Rio? A. No, sir.

Q. What open ventilators or pipes or other avenues of ingress of water were there in those cargo compartments where libellant's cargo was stowed, and I think they were stowed in 1, 2 and 3 upper tween decks and in No. 4 upper and lower tween decks?

A. That is correct, yes, sir. No. 1 tween decks had no water line, and the ventilating system was a blower system which took the air in through the king post and discharged it through another king post in the after end of the hatch. The king posts were so designed and constructed that rain water or spray could not be drawn in.

Q. That is true of Nos. 1, 2 and 3 tween decks?

A. The No. 4 tween deck—I couldn't personally state about pipe lines in No. 4 tween decks, upper

(Deposition of Howard Lane.)

and lower, but 1, 2 and 3 I know are clear of pipe lines. That was due to the wartime construction when we had an armed guard berthed [160] on the vessel, pipe lines were added which were not removed on that previous conversion but we had no use for the fresh water lines as installed.

Q. Captain, did you personally inspect the hatch covers after they were fitted to see if they were tight?

A. The chief officer inspected it. The Board of Underwriters in New York inspected it and the chief officer was there.

Q. But you made no personal inspection?

A. No, sir.

Q. I believe you testified that on the voyage in question there was no heavy weather encountered to Rio?

A. There was no heavy weather, no, sir.

Q. You took no water on deck other than the usual spray from the trade winds?

A. That is all that is mentioned, that is all I remember, yes, sir.

Q. And I take it that you are of the opinion that there was no possibility of sea water having gotten into that cargo hold up to the time you reached Rio?

A. I am of that opinion, yes, sir.

Q. There was no evidence on board of the ship that as a result of your personal inspection would lead you to believe that water did get in?

A. No, sir, not the stowage as I know the cargo was [161] stowed.

(Deposition of Howard Lane.)

Q. I take it that you were not present at all times at Rio while libellant's cargo of flour was being removed from the hatches?

A. That is true.

Q. So you could not of your own personal knowledge testify as to whether there was any stained or caked cargo? A. That is true, yes, sir.

Q. Are you familiar with the practice in Rio of delivering direct to the consignees and not to the custom house?

A. Yes, sir, due to the shortage of flour. At the time it was a priority cargo and the next voyage we had far more flour and we went through.

Q. So you delivered the cargo directly to the consignees

A. It was taken directly to the customers without customs' weighing and inspection.

Q. So that as to this cargo there would be no record of damage in the event there was damage to the cargo because they had not inspected it?

A. I have no knowledge of what they actually do on the pier.

Q. The general rule is under normal discharge conditions for all cargo including flour to go through the customs?

A. That is the normal procedure. [162]

Q. But during the period of the voyage in question I understand your testimony to be that the flour was discharged directly into wagons and did not go through custom's inspection?

(Deposition of Howard Lane.)

A. It was discharged directly into wagons, yes, sir.

Q. You are not prepared to testify to what customs did or did not do with respect to the cargo that went directly into the wagons?

A. No, sir. I have no knowledge of their workings on the piers. I know about this priority due to the fact that Mr. Caswell was in attendance and mentioned it was priority cargo and was taken out directly to the consignee to be sold. This is also true in ports with meats and where the food is short.

Q. Where were those wagons located with reference to the ship?

A. Alongside the ship side, approximately 40 feet away from the ship side. The cargo is removed from the ship's cargo holds by the ship's cargo gear. It was landed on the ships' deck. Then the cargo is picked up by a shore crane and swung over and landed either on the dock or into these cars alongside the pier.

Q. What are the possibilities of sea water coming in contact with the flour that is in the process of being removed from the ship's holds into these wagons? [163]

A. None with that kind of loading there unless the flour was loaded into barges.

Q. No. I am referring now to the cargo concerned in this case which was all loaded into wagons.

(Deposition of Howard Lane.)

A. There would be none.

Q. So in your opinion there would be no possibility of water contact with this flour after it left the ship's holds? A. That is correct.

Mr. Prem: I demand the production of the smooth log for the loading period in New York immediately preceding the period covered by the log which has been produced here today.

I also demand production of the rough log covering the loading period at New York as well as the ensuing voyage to Rio. That is all."

Mr. Wakefield: The log which is Respondent's Exhibit A-1 commences as of January 28, 1946, I think, and covers the balance of the voyage. This log, which has been marked Respondent's Exhibit D for Identification in connection with the deposition, is for the period preceding the other one, commencing October 26, 1945, and ending January 27, 1946. I will ask that it be marked Respondent's Exhibit A-3. [164]

(Log book marked Respondent's Exhibit A-3 for Identification.)

The Court: Is there any particular page of interest here?

Mr. Wakefield: No. The demand was made by the libelant for its production, Your Honor.

Mr. Howard: The period we were interested in, Your Honor, was immediately prior to January 28, 1946. I have no objection to that being admitted in

evidence if it is offered by respondent. We have the other portions of the log in and I submit it is entirely proper this be in. Although there is only some slight reference to it in the testimony, I have no objection to its admission. It does cover the period of loading at New York prior to the commencement of the other log already in evidence.

The Court: Do you wish to offer it?

Mr. Wakefield: Yes, I will offer it, Your Honor.

The Court: Respondent's Exhibit A-3 is admitted.

(Respondent's Exhibit A-3 received in evidence.)

The Court: What kind of log is it?

Mr. Howard: Deck log book.

The Court: Is it the rough log or the deck smooth log?

Mr. Howard: The smooth log, Your Honor. [165]

Mr. Wakefield: I think that I should state for the record that these log books, Exhibits A-1 and A-3, were both delivered to Mr. Howard many months ago for an examination. He has had possession of them.

Mr. Howard: Yes, I had an opportunity to examine them, Your Honor.

DEPOSITION OF HOWARD LANE

"Redirect Examination

By Mr. Lord:

Q. Captain, at Rio was any report made to you of any flour bags being stained or caked?

(Deposition of Howard Lane.)

A. I have no knowledge of any report being given.

Q. You are speaking now of the discharge after this voyage? A. That is right.

Q. No such report was given to you?

A. No, sir.

* * *

Mr. Wakefield: I offer the deposition of Captain Lane in evidence as read.

The next witness I would like to call on behalf of the respondent is Chief Officer Anthony Parsons.

The Court: This deposition of Captain Lane is received as a part of respondent's case in chief.

Mr. Wakefield: Can you indicate where you read?

Mr. Howard: I read all of page 37. I did not read page 38.

Mr. Wakefield: This is the deposition of the chief officer of the vessel, and counsel put in in his case page 37 of the deposition. I will commence at the [168] top of page 38.

DEPOSITION OF ANTHONY PARSONS

Direct Examination

“Q. Do you know when the Sweepstakes commenced to load cargo at pier 32?

A. No, I don't recall. She was loading when I joined her.

Q. I show you a document and ask you if you can describe it for me.

(Deposition of Anthony Parsons.)

A. This is the smooth log of the Sweepstakes.

Q. What is the last date covered in that logbook?

A. January 27th.

Q. And will you turn to the entries for January 27th, chief, and show me whether or not the signature in the lower left hand corner is yours?

A. Yes, that is my signature.

Q. Will you explain why your signature appears in the logbook of the Sweepstakes as early as January 27th?

A. Yes, I am signing it for Mr. Mills, who was the chief officer, I believe, and when he left the smooth log was not prepared yet, so it has to be signed by the chief officer at the time, so I signed it.

Q. And you recognize this as being the smooth logbook of the Sweepstakes?

A. That's right, that is a copy of the rough log.

Q. And is this book kept in the regular course of [169] business of Moore-McCormack Lines, Inc.?

A. That's right.

Q. According to the logbook entries, where was the Sweepstakes on January 27, 1946?

A. Pier 15, Brooklyn—no, she left pier 15, Brooklyn, and shifted to pier 32, North River.

Q. Did she shift on that day?

A. Yes, she shifted that day.

Q. Do the logbook entries for January 27, 1946, make any reference to loading cargo?

A. No, there was no cargo worked on that day.

Q. Now, I show you another document or book,

(Deposition of Anthony Parsons.)

which is marked Respondent's Exhibit A for identification, and ask you if you will identify that for us?

A. That is the smooth logbook for voyage No. 12 of the Sweepstakes.

Q. And on what date does that logbook commence?
A. January 28, 1946.

Q. And does your signature appear on the pages of this logbook?
A. Yes, sir.

Q. And this is the smooth log of the Sweepstakes for the voyage from New York to South American ports previously described?

A. That's right. [170]

Q. And that is a book, is it not, kept in the regular course of the business of respondent?

A. That's right.

Q. Can you tell us, Mr. Parsons, by examining the logbook, when the Sweepstakes commenced to load her southbound cargo?

A. (Referring to logbook) According to the logbook she commenced on January 28, 1946—stevedores were aboard at 8 o'clock and she commenced loading at 8:10 in the morning.

Q. As I understand your previous testimony, you have signed the entries for January 28th, January 29th and January 30th for Mr. Mills, who was the chief mate relieved by you?

A. That's right. That is done quite often, when the book is not ready when the relief arrives the relief signs it for the man he relieved.

Q. Is that because the rough log is kept day by

(Deposition of Anthony Parsons.)

day and the entries in the rough log are at various periods copied into the smooth log?

A. Yes, sometimes it takes several days for the purser or whoever is taking care of the logbook to get it typed up, and possibly the man is relieved before that."

Mr. Howard: For your information, I read from the [171] next question at the bottom of page 40 through the tenth line on page 43.

* * *

"Q. You mentioned dunnage. Will you describe the dunnage in the compartments where the wheat flour was stowed?

A. Well, the flour is stowed—we used three tiers of dunnage there, in the wings, in the after end and forward and where it is over the metal deck.

Q. Is that what is sometimes called crisscross dunnage?

A. Yes, one tier is crossed over the other.

Q. How was the bottom tier situated?

A. That is loaded so that any water that possibly enters there can lead into the scuppers.

Q. Would that be fore and aft in the tween-decks? A. Yes.

Q. Did you have any other dunnage?

A. Well, when they load flour they use paper over the dunnage to keep it from getting dirty or coming into contact with any dirt, and for sanitary reasons also.

Q. Where was that paper situated?

(Deposition of Anthony Parsons.)

A. They lay paper over the dunnage and they also laid paper over any metal, against any metal, so the bags won't come into contact with metal or wood.

Q. What that done in this instance?

A. Yes, used regular dunnage paper, heavy paper. [172]

Q. Did you observe this paper to be in place in Nos. 1, 2, 3 and 4 upper tweendecks and No. 4 lower tweendecks?

A. Well, when I went aboard they were not loading flour in all those hatches but they did have paper and dunnage where they were loading.

Q. Is it your testimony, chief, that in all compartments where wheat flour was loaded you did have the dunnage you described as well as the cargo paper?

* * *

A. Yes."

Mr. Howard: The testimony from the last line on page 44 through the eleventh line on page 45 was read in libelant's case in chief.

* * *

"Q. Will you check the logbook entries from January 31st throughout the balance of the period of loading and tell us whether or not there was any rain?

A. (Referring to logbook) No, we had no rain from the period I joined the vessel until we left New York.

(Deposition of Anthony Parsons.)

Q. Do you remember, Mr. Parsons, whether the bags of wheat loaded on the Sweepstakes were taken from pier 32 or from lighters, or both?

A. No, I could not rightly say I recall that. I recall [173] seeing some of them coming aboard from the docks, I don't recall that they all came aboard that way, whether some were loaded from lighters or not.

Q. What was the vessel's itinerary after she left New York in her voyage to Rio de Janeiro?

A. Stopped at Port of Spain, Trinidad, to take on fuel and to discharge some mail.

Q. Where was that mail stowed, do you recall?

A. Yes, that was stowed in No. 5 hatch in the square of the hatch, top sowage so it could be discharged readily. That was the only cargo we had for Trinidad, if I recall correctly.

Q. Did you open any of the other hatches?

A. No, no necessity for opening them.

Q. What type of hatch covers did the Sweepstakes have? A. Steel pontoon covers.

Q. Was it the practice to use any other cover in addition to the pontoon?

A. There was three tarpaulins on top of that to make them watertight.

Q. Did you at any time inspect the tarpaulins?

A. They were inspected when they were put on.

Q. What did you find as a result of such inspections?

A. They were put on properly, no tears in them.

(Deposition of Anthony Parsons.)

Q. Did you make any other stops on your voyage south [174] before reaching Rio?

A. No, not that I recall.

Q. Will you tell us when the Sweepstakes arrived at Rio?

A. I will have to check the logbook for that date. (Referring to lookbook.) Arrived at Rio February 19, 1946.

Q. Was that in anchorage or dock side?

A. No, we anchored.

Q. Did you thereafter proceed to a dock?

A. No, we docked on February 20th.

Q. Do you remember whether you were on watch at the time the hatches were opened at Rio?

A. Well, I was on duty when they opened up the hatches so I could look at them.

Q. Did you make an inspection of the hatches at that time?

A. Yes, I sighted the hatches, looked at the general condition of the cargo.

Q. Did you have any particular objective in mind at the time you sighted these hatches?

A. To see if there was any possibility of condensation, any sweat damage noticeable, any other thing that might have occurred during the voyage. It was a rather smooth voyage, there was no heavy weather damage or anything like that, so the only thing I looked for was any possibility of sweat. I did not observe any. [175]

Q. Was there anything called to your attention

(Deposition of Anthony Parsons.)

during the voyage which would suggest leakage of any character?

A. No, nothing unusual. We had good weather all along, bilge soundings were small and fairly constant.

Q. Now, chief, was it the practice of the company at discharging port to keep a record of damage observed during the course of discharge?

A. The company ashore or on the ship?

Q. I am referring to Moore-McCormack Lines.

A. On the ship we keep a record of all damaged cargo, daily record when we observe any damage.

Q. Was it the practice at Rio to keep a record even on days when no damage was observed?

A. No, at Rio if we did not observe any damage we just didn't bother making out any report.

Q. Do you recall whether or not you prepared any such reports at Rio?

A. Yes, I prepared reports at all ports.

Q. Do you remember whether or not any of those reports mentioned damage to wheat flour?

A. No, I am not sure of that. I don't recall any flour being damaged at all—I recall other cases and stuff.

Q. Do you remember that any report was made to you by anyone of damage to wheat flour during the course of discharge?

A. No, at no time was there any report, any mention [176] made of any damage at all.

(Deposition of Anthony Parsons.)

Q. Was this cargo of wheat flour discharged into lighters on onto the quay?

A. As far as I can recall, the cargo was discharged onto the quay, but I couldn't say definitely if all of it went onto the quay or some went into lighters, but I recall seeing some of it going into flat cars.

Q. Do you remember any flour going into lighters?

A. No, I don't remember seeing any, I don't recall.

Q. You don't know what became of this flour after it left the ship, do you?

A. No, we are usually not interested in that part of it, as long as it leaves the ship in good condition usually our responsibility ends there, we don't follow it any further.

Q. Will you look at the log entries for the entire period of discharge and tell us first when the discharge ended?

A. (Referring to logbook.) Finished discharging February 25, 1946.

Q. Are there any entries in the logbook, chief, about rain for the period commencing February 20th and ending February 25th?

A. Yes, we had some periods of rain during that time.

Q. Do you remember what was done when rain came up during the course of discharge? [177]

A. Well, it is the practice to stop discharging if

(Deposition of Anthony Parsons.)

there is any possibility of the cargo being damaged, especially flour, why, we would stop immediately. According to the logbook I see mention made of the hatches covered due to rain.

Q. In other words, you immediately stop discharge and cover up the hatches?

A. Yes, if we have rain or anything that can get damaged we stop immediately.

Q. When discharging was completed at Rio on February 25th, did you then make an inspection of the compartments out of which this wheat flour had been discharged?

A. Well, I make an inspection all the time, especially near finishing time, primarily to see if there is any overlooked cargo, so we have to inspect all compartments, make sure there is nothing for Rio left in the ship.

Q. Did you on such occasions inspect the Nos. 1, 2, 3 and 4 upper tweendecks and No. 4 lower tweendecks?

A. Yes, inspected all hatches and all compartments where we had Rio cargo.

Q. Did you find any evidence of moisture or water in those compartments?

A. No, I don't recall seeing any.

Q. Chief, based on your experience as a chief officer who holds a master's papers and who has sailed on ships as chief officer since 1943 continuously, what is your opinion [178] as to the seaworthiness of the Sweepstakes for the transportation of wheat flour?"

(Deposition of Anthony Parsons.)

Mr. Howard: Same objection, if the Court please. This witness is asked to state an opinion as to the seaworthiness of the vessel. He is not asked to state facts; he is asked to state an opinion on it, and I submit that is a matter within the province of the trier of the fact.

The Court: The objection is overruled.

“A. In my opinion she was seaworthy in all respects for the carriage of any cargo.

Q. Have you any opinion as to whether it was possible for the wheat flour to come into contact with salt water during the voyage?

A. I don't see how it could be possible.

Q. Chief, do you expect to leave port shortly?

A. Yes, on Friday, I expect.

Q. Friday of this week?

A. Friday of this week.

Mr. Howard: Counsel, as far as the demand for production is concerned, I believe you produced for me [179] the documents you had available covered in this request. I am therefore willing to waive the reading over to page 53 where the questions begin.

Mr. Wakefield: Your Honor, at this time the respondent would like to have marked for identification as Exhibit A-4 two papers stapled together at the top, entitled “Mate's Report of Damaged Cargo, S/S Sweepstakes, Voy. No. 12—S. B., Port Rio de Janeiro, Feb. 22, 1946,” and signed by H. J. Lane, master, and S. Parsons, chief officer.

(Mate's Report marked Respondent's Exhibit A-4 for Identification.)

(Deposition of Anthony Parsons.)

Mr. Howard: Libelant objects to the admission of this document solely on the basis that it has not been identified in the testimony of this witness or any other witness that I recall having testified to date on behalf of respondent that this is the report, or that any of the witnesses had anything to do with signing this report.

Mr. Wakefield: That is the original report of cargo damage at Rio de Janeiro, signed by the master and chief officer. He testifies concerning it in the deposition just read, and it is one of the documents that the libelant demanded, as I recall it. It is an original bearing their signatures. [180]

Mr. Howard: The fact that we may have demanded it does not mean we are bound to allow it to be admitted in evidence. My objection is solely on the basis that it is not properly identified. No witness has testified to this particular document, or identified it. There is some testimony that as a matter of practice they do make some record of damage observed during the course of discharge, but the witness was not asked to identify this document. Counsel must have had it available at the time the deposition was taken and no effort was made to identify it at that time. It is solely on that basis that I object to the admissibility of A-4 for identification.

The Court: Will you point out the proof which you claim properly authenticates this, and as to respondent's right to have it admitted?

(Deposition of Anthony Parsons.)

Mr. Wakefield: I will say this, that document came to me with the depositions and it does not bear—will you see if it bears any identification mark in connection with it?

Mr. Howard: Only the identification mark put on this afternoon in court. It is not listed as one of the exhibits in the index to the deposition, counsel.

Mr. Wakefield: I thought we had just read where he talked about his report. [181]

Mr. Howard: On page 48, there is some reference to the making of such reports, but no mention of a report having been made at Rio de Janeiro on this particular voyage. It is a reference only in general terms, that he prepared reports at all ports.

Mr. Wakefield: On page 48 he does say he prepared a report at Rio, and he doesn't recall any flour being damaged.

Mr. Howard: This document wasn't produced for identification of the witness at the time that question was propounded to him. We have no way of telling that this is the report that the witness had in mind when he said that he did make some report, other than the unsworn testimony that this is the report that counsel received along with the deposition, which is not identified in the deposition.

Mr. Wakefield: I won't offer it at this time. It is marked for identification. It may be dealt with in the cross-examination, Your Honor. With respect to the cross-examination on pages 51, 52 and part of 53, demands are made for

(Deposition of Anthony Parsons.)

various documents, and I understand counsel now to say that those demands were complied with and we need not read that, is that correct?

Mr. Howard: That is correct. Some documents were furnished, including the logbooks and hatch tallies. [182]

“Cross-Examination

“By Mr. Prem:

Q. The master of the Sweepstakes testified that it was his understanding that when damaged cargo was received on board the ship from the dock the ship would give the dock department receipts noting the damaged condition. Are you aware of any such practice?

A. Well, our practice is in all ports——

Q. I am referring now to the port of New York.

A. Well, in the port of New York also, any damage that we observe coming aboard the ship we make a report of it, the mates report damaged cargo.

Q. Well, the captain testified further, he said there was a formal receipt given to the ship for all cargo coming aboard the ship and that where such receipted cargo showed signs of damage they would note that on the receipts given to the dock department.”

Mr. Howard: I believe that is supposed to be “form of receipt,” counsel, rather than “formal receipt.”

“Mr. Lord: I do not recall that, Mr. Prem, in that form.

(Deposition of Anthony Parsons.)

A. Perhaps the captain was referring to dock receipts.

Q. Well, what is your testimony about the type of receipt given in respect of cargo received on board the [183] Sweepstakes?

A. The only type of receipt we handle, we handle no receipts of any sort concerning the cargo, the only thing is we make a report of any cargo we observe damaged, and if it is to any extent then we bring it up with some superiors immediately so they can get the dock receipts endorsed to that extent—if it is anything minor we just make a report on it on a damaged cargo report.

Q. Does the ship keep a copy of the tally slips?

A. We are given a copy of the tally slips before the ship sails.

Q. You have no personal recollection at this time, I take it, of what is on those tally slips?

A. These are tally slips, aren't they (indicating).

Mr. Lord: Witness referring to the hatch tallies.

Q. Have you seen the tally slips which were retained by the vessel, lately?

A. Yes, they are handed to me personally and then I look through them during the voyage.

Q. When did you last look at them?

A. The last time I looked at them would be before I turned them in at Rio.

Q. And that is some years ago? A. Yes.

Q. And you have no recollection at this time of what [184] was on those tally slips?

(Deposition of Anthony Parsons.)

A. No, not the ship's copies.

Q. Where are those tally slips at this time?

A. It is the practice in Rio when the ship arrives to give the stevedore foreman all the Rio tally slips, on which he makes out his list of cargo, so they would be in Rio because they are not returned to us.

Q. Does the stevedore turn those over to the Rio office of Moore-McCormack?

A. I couldn't say.

Q. He does not return them to the ship?

A. No.

Q. I suppose you were below for part of the time while this cargo was being loaded on board the ship?

A. Yes.

Q. So you doubtless saw just a small part of this shipment of flour actually come aboard the ship and stowed in the hold?

A. That's right.

Q. And as I understand it, you came aboard the ship after some of the loading had commenced, so obviously you could not have gone down into the holds to have observed the condition of those holds where the cargo had been so stowed?

A. Not prior to my loading. [185]

Q. Not prior to your going aboard the ship?

A. Not prior to cargo loaded before my being on the ship.

Q. Are you in a position to say at this time what quantity of cargo had been loaded before you went aboard the ship?

(Deposition of Anthony Parsons.)

A. No, I could not, I just have a general recollection of seeing flour there, and other cargo.

Q. How many days had the loading been in progress before you went aboard?

A. I have to check the logbook.

Q. You might take the time to do that.

A. (Referring to logbook): That would be three days prior to my joining the vessel.

Q. How many days was the vessel engaged in loading at New York, actual loading?

A. Seven days.

Q. So that on the basis of the loading time, the vessel was not quite half loaded when you went aboard—three against seven?

A. Well, if you want to arrive at it—that is what the average is.

Q. I presume that in respect to those holds in which cargo had been stowed before you came aboard, you did not go down into those holds to make any examination during the course of loading? [186]

A. We keep a constant check on all the holds.

Q. Well, I am referring now to you personally—did you go down to any of the cargo holds that were in the course of being loaded after your arrival or board the ship?

A. I checked every space that was accessible, that was not blocked off by cargo.

Q. Tell me precisely what you did inspect of those cargo holds in which libellant's flour was stowed, if you recall at this time?

(Deposition of Anthony Parsons.)

A. Well, the only thing I can recall about the flour is that we are very careful about that, especially so that it won't get dirty, the bags, so there would not be any chance of coming up against any metal and having any damage in that respect, so I recall making sure that the spaces were properly protected.

Q. It was not necessary for you to go down into the hold to note that the paper dunnage was properly laid?

A. Oh, yes, it is necessary to go into the hold and check each space individually.

Q. As to the tweendecks, couldn't you observe that without going actually into the tweendecks?

A. No, we go in all the holds and look around as much as possible.

Q. Isn't that one of the jobs you delegate to one of the other officers? [187]

A. No, it is part of my responsibility to see that the cargo is properly stowed.

Q. Is it my understanding that you went into every hold? A. Yes.

Q. You recall that distinctly at this time?

A. Certainly.

Q. Or are you now referring to what your practice is?

A. No, I recall after joining the vessel I made an inspection of all the holds and compartments.

Q. Of course your inspections on those occasions were entirely visual?

(Deposition of Anthony Parsons.)

A. Visual as differentiated from what?

Q. Well, making tests, for instance?

A. Yes, I saw it just to observe the general condition of the holds and the cargo stowed there.

Q. There are many connections and pipes in the hold which escaped your observation, I presume, in the course of your walking around the compartments to see about the paper dunnage?

A. No, we inspect battens to see if there is any missing, and inspect sanitary pipes and wiring.

Q. How long does it take you to make an inspection of that nature in, say, No. 3 tweendeck?

A. Well, it wouldn't take too long, I wouldn't say [188] more than ten minutes.

Q. It would take you about ten minutes to make the inspection that you made on this occasion in No. 3 tweendeck?

A. At the most.

Q. Would it take you a comparable length of time in respect to the other tweendeck spaces in which the flour was stowed?

A. That is according to how much cargo was in at the time, and how much I could inspect.

Q. But you do not have at this time a clear recollection of how much cargo was in each of the holds that were in the progress of loading before you arrived on the vessel?

A. No.

Q. So then I take it that your present recollection of what you did in looking about those holds is somewhat vague at this time?

A. Well, it is the same routine I always follow.

(Deposition of Anthony Parsons.)

Q. That is the point I made before. What you are testifying to now is largely based upon what you usually do when you make an inspection and not what you actually did?

A. I could not recall any fine points of that inspection.

Q. Not what you actually did at that time. Is it based upon what your general practice is?

A. Yes. [189]

Q. As I understand it, on the voyage you encountered no heavy weather?

A. That is correct.

Q. During the period the cargo was being discharged from the cargo compartments to the dock, there again, I presume, you had other duties to attend to and you were not on deck throughout that period to observe the condition of the cargo, isn't that true? A. That's right.

Q. So that it is entirely possible stained bags or caked bags might have come over the ship's side without your personal knowledge?

A. Well, we always have another ship's officer on deck at all times.

Q. Well, so far as you are personally concerned, you did not see any stained or caked bags, but there was a possibility that some could have come overboard onto the dock without your personal observation? A. Yes, there is that possibility.

Q. After the ship was completely discharged did you go down into each of the compartments where

(Deposition of Anthony Parsons.)

the flour was stowed to look around to see whether or not any water did or could have entered?

A. Not only when it was all discharged but during the course of discharge I entered the compartments frequently [190] to see if there was any damaged cargo.

Q. Did you make the same kind of inspection of the cargo compartments at that time as you made at New York during the course of loading?

A. No, that examination is not so thorough.

Q. At what time—at Rio?

A. At discharging.

Q. Your examination was not as thorough at Rio as it was at New York? A. That's right.

Q. I presume your recollection at this time as to the quantity of dunnage that was on shipboard, and particularly in those compartments where libellant's flour was stowed, is rather vague, is not that true?

A. Well, I recall being careful of the flour. The captain had mentioned that we were carrying flour and to make sure that was stowed properly, so I do recall that they had dunnage paper and the three tiers of dunnage.

Q. Well, you of course would not know as to that cargo which was in the course of loading before you got on board, as to what they had on the bottom tier? A. No.

Q. If these sacks of flour were stowed on the ship's skin or some portion of the ship where you did not have paper or wooden dunnage, that would account for this damage, [191] would it not?

(Deposition of Anthony Parsons.)

A. I don't see how it could account for any large amount of damage, even if any flour had been stowed directly with steel, because we did not have any sweat during the voyage—besides, the ship had the wooden battens to protect any cargo coming up against it.

Q. You don't think then that stowing bags of flour against steel on a voyage from New York to Rio leaving New York in January would cause any damage by staining or caking?

A. Oh, it would, yes—I don't say it would cause damage to all the flour, just possibly that part that was against the steel.

Q. Yes, that is the point I make, that it would cause damage to that flour which was in direct contact with the steel plate?

A. It might cause damage.

Q. Have you ever found such damage to exist on any ship?"

Mr. Howard: Your Honor, I will waive that question and the next two subsequent questions because of the ruling that the Court has previously made as to this type of testimony. This is our witness on cross-examination, and I withdraw those questions.

Mr. Wakefield: I don't see any reason for [192] withdrawing it. It is part of his cross-examination, it isn't mine.

The Court: It will not be withdrawn. Proceed.

"Q. Have you ever found such damage to exist on any ship?

(Deposition of Anthony Parsons.)

A. Yes, we have found sweat damage on ships.

Q. Resulting from stowing of bags of flour against steel?

A. Yes, some bags that touched the steel at some point. You were not referring to this voyage, were you, during the course of my time?

Q. My question was directed to voyages other than the one in question. A. That's right.

Q. On direct examination you testified that you had no explanation as to how flour on this voyage became damaged on shipboard. By that answer you mean that you are not aware at this time of any water having entered the vessel during the voyage?

A. That's right, and when I noticed the cargo being discharged I did not see any improper stowage at any time which would allow any cargo to come up against any steel or be damaged in any way, and I observed no sweat damage or sweat there that would allow any bags to get stained. [193]

Q. Well, is it not a fact that a certain degree of sweat develops on every voyage from New York to South American ports, Brazil and the Argentine?

A. Well, that is a very hard question to answer. I have observed some shipments of cargo very closely on ships where they should have sweat and it is not present, and other times where you would not expect sweat to be present we did have it.

Q. But you will admit that it is a very usual experience to have sweat on a voyage from New York to Rio or Santos?

(Deposition of Anthony Parsons.)

A. Ordinarily you might have sweat, yes, condensation.

Q. It is an ever-present danger that you have in mind at the time you stow cargo and you anticipate it?

A. That is why they are so careful in the stowage of it.

Q. I believe you testified that you have no knowledge of the receipt of libellant's cargo of flour from lighters at New York to the dock?

A. No, I don't recall any."

The Court: At this point we will take the mid-afternoon recess. Those connected with this case are excused for at least ten minutes.

(Recess.) [194]

The Court: You may resume the reading of the deposition.

"Redirect Examination

By Mr. Lord:

Q. Are these nine slips of paper which you described as hatch tallies exact copies of the hatch tallies kept by the vessel and surrendered to the agents at discharge port?

A. Yes, these are the originals—we get a carbon copy.

* * *

Q. Now, chief, Mr. Prem has suggested that sort of roughly about half of the vessel may have been loaded before you joined the Sweepstakes in New

(Deposition of Anthony Parsons.)

York. Leaving apart for a moment Mr. Prem's fractions—3 not representing quite half of 7—will you tell us what part of a ship you load first?

* * *

A. Well, since on this voyage as far as I can see all the cargo was loaded in New York, it would be customary to start loading from the hold and then work up.

Q. Again roughly speaking, what percentage of the total cubic for cargo would you say that the lower holds in the Sweepstakes bore to the total cargo space?

* * *

A. Well, roughly speaking, one-half, I would say.

Q. You as chief officer would be the individual on a [195] vessel responsible for stowage, is that not correct?

A. That is correct.

Q. You are the cargo officer?

A. That's right.

Recross-Examination

By Mr. Prem:

Q. Chief, how can you recall at this late date that the hatch tallies which have been handed you are exact copies of the carbons that you gave to the stevedores at Rio?

A. Well, I am only assuming——

Q. That is all.

A. On the face of them, it is the Sweepstakes,

(Deposition of Anthony Parsons.)

the date, that these are the originals of the cargo we loaded.

Q. You have no recollection at this time what was on those carbon copy hatch tallies? A. No.

Redirect Examination

By Mr. Lord:

Q. This writing on the first page in pencil—referring again to these hatch tallies—“Claim 247-212”—would that have appeared on these tallies when you first observed them, and on the ship’s copies? A. No, I don’t see why it should.

Mr. Lord: For the record, that is the claim number of Moore-McCormack Lines, Inc., relating to the claim which libellant now makes.” [196]

Mr. Wakefield: I would like to offer the deposition of Chief Officer Anthony Parsons.

The Court: This deposition of Parsons, the parts read on behalf of respondent, is now received as part of respondent’s case in chief.

Mr. Wakefield: If the Court please, at this time respondent offers Respondent’s Exhibit A-4, which is the cargo damage report signed by the captain and chief officer. Counsel for libelant has objected to that as not being identified, and for some reason—I assume it was a mistake, but for whatever reason it was—it wasn’t identified in the deposition, although the testimony was given concerning it. We offer it at this time merely to put ourselves in the position of giving the Court and libelant any and

(Deposition of Anthony Parsons.)

all evidence or documents pertaining to this voyage and this cargo, and if counsel wishes to object I think the objection is well taken, but we nevertheless offer it.

Mr. Howard: I renew my objection, if the Court please, on the basis that the exhibit has not been identified by any witness testifying to date.

The Court: It is denied admission. It is rejected.

Mr. Wakefield: Next, respondent would like to present the deposition of Mr. A. M. Caswell, the agent at Rio de Janeiro for the respondent. [197]

DEPOSITION OF ALICK CASWELL

Direct Examination

“Interrogatory No. 1: Please state your name, age, nationality and where you now reside.

First—To the First Interrogatory he says:

Alick Mackenzie Caswell, age 51 years, British nationality, Rua Fegundes Ferreira, 541, Niteroi, State of Rio de Janeiro, Brazil.

Interrogatory No. 2: State by whom, where and in what capacity you were employed in February and March, 1946.

Second—To the Second Interrogatory he says:

By Moore-McCormack Navegacao S. A., as Brazilian claims agent.

Interrogatory No. 3: State for how long you have been employed in the above capacity; also

(Deposition of Alick Caswell.)

whether you are still employed by the same concern and in the same capacity.

Third—To the Third Interrogatory he says:

I have been employed since 1938 in the above capacity; I am still employed by the same concern in the same capacity.

Interrogatory No. 4: State the duties of your employment and what experience and training you have had in connection with your present position.

Fourth—To the Fourth Interrogatory he says:

I am responsible to Mr. E. M. Smith, Moore-McCormack Line, Inc., New York, for all claims matters in respect to Moore-McCormack ships in Brazil. I have been connected with shipping since 1919.

Interrogatory No. 5: Are you familiar with a certain shipment of 10,500 bags of wheat flour consigned to Companhia Luz Stearica and shipped on board the S. S. "Sweepstakes" from New York, arriving at Rio de Janeiro about February 20, 1946, and state generally your duties with respect to such shipments.

Fifth—To the Fifth Interrogatory he says:

I am familiar with said shipment. It is my responsibility to acquaint myself with serious damage as discharge proceeds, which I normally carry out by a daily visit to the steamer and by information received from the Moore-McCormack Rio office employees working aboard ship or on the quays—stevedore, foremen, etc.

Interrogatory No. 6: Were you present and on

(Deposition of Alick Caswell.)

board the S. S. Sweepstakes at Rio de Janeiro from time to time when the shipment of 10,500 bags of wheat flour in question, consigned to Companhia Luz Stearica, was being discharged from the vessel?

Sixth—To the Sixth Interrogatory he says:

Yes.

Interrogatory No. 7: Please state the date or dates and hours on those days when the flour was discharged from the vessel.

Seventh—To the Seventh Interrogatory he says:

Night and day on the 21st, 22nd and 23rd days of February, 1946.

(Here witness consulted notes.)

Interrogatory No. 8: If you have available office records showing details of this discharge of flour from the S. S. Sweepstakes, please state what the records show as to the time of discharge and the quantity discharged.

Eighth—To the Eighth Interrogatory he says:

It is impossible to answer this question since part of the shipments of flour ex S. S. Sweepstakes were tallied out by mixed marks.

Interrogatory No. 9: If the shipment of flour in question had been damaged at the time of discharge, would this fact have come to your attention, and please explain.

Ninth—To the Ninth Interrogatory he says:

Employees from my department who are aboard

(Deposition of Alick Caswell.)

checking tallies with manifests as discharge proceeds keep me informed. In addition, foremen, etc., have instructions to telephone me in case of serious damage coming to light; therefore, if the flour showed visible damage, my attention would normally have been called to it.

Interrogatory No. 10: To your knowledge, was the shipment of flour in question damaged in any respect, or was it wet or damp from water or otherwise at the time it was discharged from the vessel, and please explain fully your answer.

Tenth—To the Tenth Interrogatory he says: [200]

I have no knowledge of any damage to this flour either by water or other form of damage visible at the time of discharge.

Interrogatory No. 11: What is the usual procedure of a vessel concerning the discharge and delivery of a shipment of flour at Rio de Janeiro?

Eleventh—To the Eleventh Interrogatory he says:

Flour can be delivered to customs warehouse either alongside steamer or to other customs warehouses designated. If consignees pay duty prior to or immediately upon steamer's arrival they can generally obtain permission from the port authorities to have flour delivered to rail cars or trucks for conveyance to their private deposits.

Interrogatory No. 12: Was the usual procedure followed in this instance of discharge from the S. S. Sweepstakes on or about February 20, 1946, and if it was not, please explain fully.

(Deposition of Alick Caswell.)

Twelfth—To the Twelfth Interrogatory he says:

The shipment in question was delivered to rail cars alongside for conveyance to consignee's mill.

Interrogatory No. 13: What instructions did you receive from the consignee, Companhia Luz Stearica, regarding discharge and delivery of the flour and what was actually done in this connection?

Thirteenth—To the Thirteenth Interrogatory he says: [201]

I received no instructions from Cia. Luz Stearica regarding discharge and delivery of their flour. In Rio de Janeiro, all instructions as to where cargo is to be delivered are received by steamer's agent from docks administration who supply the necessary rail car. Probably Cia. Luz Stearica, after obtaining the necessary authority from customs and docks administration, instructed the docks administration of their requirements; in such cases, once cargo is delivered to rail cars alongside it is considered as delivered to customs and responsibility of the steamship company ceases from that time.

Interrogatory No. 14: If instructions received by you were in writing, set forth a copy if you have a copy, otherwise state the substance of such instructions and from whom and when you received them.

Fourteenth—To the Fourteenth Interrogatory he says:

This is replied to in question 13.

Interrogatory No. 15: If in answer to the two

(Deposition of Alick Caswell.)

preceding interrogatories you have stated that cargo was delivered directly by the ship into wagons or railway cars alongside the ship, please state who arranged for the wagons or cars and whether delivery into the cars in this instance constituted delivery to the consignee.

Fifteenth—To the Fifteenth Interrogatory he says:

This is replied to in question 13. [202]

Interrogatory No. 16: In connection with the preceding interrogatory, if you can, state from your records the details of discharge into such cars, such as the dates, quantity, number of car, number of bags and other details of delivery of the shipment of flour to the consignee, libelant Companhia Luz Stearica.

Sixteenth—To the Sixteenth Interrogatory he says:

It is impossible to answer this question since part of the shipment of flour ex S. S. Sweepstakes were tallied out mixed marks.

Interrogatory No. 17: Was any inspection made of the flour during discharge into the cars or wagons, and by whom was it made?

Seventeenth—To the Seventeenth Interrogatory he says:

To my knowledge, no detailed inspection was made.

Interrogatory No. 18: In connection with the requirements of the Customs at Rio de Janeiro, please state the usual procedure for discharging a cargo of flour, including in detail just what is done, what in-

(Deposition of Alick Caswell.)

spections and reports are made, and state in what respects the discharge of the flour in question in this case from the S. S. Sweepstakes on or about February 20, 1946, differed from the usual procedure and who made the arrangements for this method of discharge?

Eighteenth—To the Eighteenth Interrogatory he says: [203]

A customs house guard and dock tally clerk are responsible, together with our own tally clerk, for noting in official register the mark and weight of torn bags and/or mark and quantity of damaged bags; the procedure in reference to the flour ex S. S. Sweepstakes did not differ from the usual procedure covering flour despatched for delivery to consignee's deposit.

Interrogatory No. 19: Do you or the Steamship Company or the vessel have any control over or responsibility for the cargo after it is discharged into the wagons or cars alongside the vessel, and if not, please explain, if you know, how the cargo of flour is or was handled after being loaded into the cars. Nineteenth—To the Nineteenth Interrogatory he says:

Our responsibility ceases once the flour is discharged to rail cars; once the cargo is delivered, the rail cars are out of our control, but presumably they were shunted to Cia. Luz Stearica's mill and there discharged.

Interrogatory No. 20: If cargo is damaged upon

(Deposition of Alick Caswell.)

discharge, do you receive any report of such damage from the Customs at Rio de Janeiro?

Twentieth—To the Twentieth Interrogatory he says:

Damage is noted on official customs register, which register is available for our inspection.

Interrogatory No. 21: Did you receive any report [204] of any damage to the flour discharged from the S. S. Sweepstakes on or about February 20, 1946, and consigned to libelant Companhia Luz Stearica?

Twenty-First—To the Twenty-First Interrogatory he says:

No.

Interrogatory No. 22: What do the Customs records at Rio de Janeiro show with respect to any damage to this flour, and if a report or records are available, please attach a copy of the record or certificate to this deposition.

Twenty-Second—To the Twenty-Second Interrogatory he says:

Customs records for this shipment indicate no damage to the flour in question; the only means of obtaining confirmation of contents of customs register is to petition for that information by customs certificate; since the obtaining of said certificate takes time, it is not available for attaching to this reply.

Interrogatory No. 23: On what date did you first receive any notice from the consignee, Companhia

(Deposition of Alick Caswell.)

Luz Stearica, or from anyone else that there was alleged damage to the shipment of flour in question by reason of being wet, and if such notice in writing, please attach a copy to this deposition.

Twenty-Third—To the Twenty-Third Interrogatory he says:

Our files do not disclose any communication from consignee. However, part of the file on this claim is with [205] our New York office.

Interrogatory No. 24: Did you reply to the notice of damage and if so, set forth a copy of your reply to be attached to this deposition.

Twenty-Fourth—To the Twenty-Fourth Interrogatory he says:

See my answer to question 23.

Interrogatory No. 25: Were you or your company or the vessel or anyone on their behalf given any opportunity to inspect any of the alleged damaged flour, or to obtain samples of the same.

Twenty-Fifth—To the Twenty-Fifth Interrogatory he says:

No.

Interrogatory No. 26: If in answer to the preceding interrogatory you state that you did examine the flour, please set forth in full your findings, but if you did not have any opportunity to examine it, please explain why you could not examine the flour in question.

Twenty-Sixth—To the Twenty-Sixth Interrogatory he says:

(Deposition of Alick Caswell.)

We were not invited to examine the flour.

Interrogatory No. 27: Please describe the wagons or cars into which this shipment of flour was discharged, with particular reference to whether they are covered or uncovered, or are otherwise protected in any way from the rain and weather.

Twenty-Seventh—To the Twenty-Seventh Interrogatory he says: [206]

Flour is normally discharged to open freight cars and covered by tarpaulin; covering of rail cars by tarpaulin is the responsibility of the docks administration; I cannot recall at this date whether the rail cars in question were properly covered or whether the tarpaulins were in good condition.

Interrogatory No. 28: If you can recall, or if your records so indicate, please state whether or not it rained in Rio de Janeiro at any time between February 22, 1946, and March 6, 1946, and, if you know, on what days and to what extent, or for what period of time.

Twenty-Eighth—To the Twenty-Eighth Interrogatory he says:

I cannot say offhand whether it rained in Rio de Janeiro between February 22 and March 6, 1946.

Interrogatory No. 29: If you know, please state whether any of the flour in question was discharged from the S. S. Sweepstakes on February 20, 1946, or thereafter in the rain, and please explain fully what was done by the vessel in this respect.

Twenty-Ninth—To the Twenty-Ninth Interrogatory he says:

(Deposition of Alick Caswell.)

Customs house guards are not permitted to discharge flour during rain.

Interrogatory No. 30: To your knowledge, was any cargo carried on the S. S. Sweepstakes on the voyage in question damaged by salt water or damaged in any other respect. [207]

Thirtieth—To the Thirtieth Interrogatory he says:

To my knowledge no cargo carried on the S. S. Sweepstakes on the voyage in question was damaged by salt water. I have no record of any other damage except normal breakage through handling.

Interrogatory No. 31: If there had been damage to the cargo on the S. S. Sweepstakes on the voyage in question, how would such damage have come to your attention, and please explain fully.

Thirty-First—To the Thirty-First Interrogatory he says:

Such damage would have come to my attention through the records in the customs house register and by verbal advice from stevedores and/or our own employees, as explained above.

Interrogatory No. 32: Assuming that some portion of the shipment of flour in question was wet or damp, or had been wet or damp when it arrived at consignee's warehouse, or otherwise came into consignee's possession on or about March 5 or 6, 1946, state, if you know, how such condition could have been caused if it was not in such wet condition when it was discharged from the vessel."

Mr. Howard: On behalf of libelant, we object

(Deposition of Alick Caswell.)

to this question, since he has not been qualified as an expert to express an opinion on a hypothetical question as to how this cargo could have been damaged. This man [208] is identified as a claims agent, for about eight years up to the time of this incident at Rio de Janeiro. The question assumes that the witness has been qualified as an expert to express an opinion as an expert witness on this question.

Furthermore, the question has the wrong date as to the time of delivery, received "on or about March 5 or 6." All of the testimony in this record shows the flour was received prior to or by March 2. I submit this witness is not qualified.

The Court: One witness said that discharging from the vessel was completed on the 25th of February, didn't he?

Mr. Wakefield: That is correct.

Mr. Howard: My statement was that the cargo was received by the consignee at consignee's warehouse by March 2.

Mr. Wakefield: The dates of March 5 and 6 are the dates that the survey was made. The witness Ramos by his deposition testified that he made two surveys of this damaged flour at the libelant's warehouse. One was, as I recall, March 6, which is the only purpose of that March 6 date, that being the date of the survey.

The Court: The objection, I believe, should be overruled. It is so ordered. [209]

(Deposition of Alick Caswell.)

“Thirty-Second—To the Thirty-Second Interrogatory he says:

Such damage could have been caused through flour becoming wet while waiting in rail cars, through faulty tarpaulins, or through consignee's discharging at their deposit in rain.

Interrogatory No. 33: If there is anything additional you can add to the matters covered in the foregoing interrogatories pertaining to the problem in question, please make a statement in respect of such matters.

Thirty-Third—To the Thirty-Third Interrogatory he says:

I wish to add nothing to the above.

Cross-Interrogatories

No. 1. In connection with your answers to the direct interrogatories, please state with whom you have discussed this matter prior to the taking of this deposition.

First—To the First Cross-Interrogatory he says:

I have discussed it with nobody.

No. 2. What records, if any, have you examined to refresh your recollection or to enable you to testify?

Second—To the Second Cross-Interrogatory he says:

Only tallies.

No. 3. In answering direct interrogatories No. 5 through 8, and No. 12 through 17, please state

(Deposition of Alick Caswell.)

whether you [210] are testifying from your own memory or from some written records, and if from written records, please state (a) what these records are, and when they were prepared; (b) who prepared the records; (c) where you obtained the records; and (d) where the records have been kept since they were prepared.

Third—To the Third Cross-Interrogatory he says:

I testified from my own memory, except for questions No. 7 and No. 8, for which information was obtained from tallies.

(a) Tallies prepared during discharge of flour.

(b) Tally clerks.

(c) From our own files.

(d) In the Moore-McCormack office in Rio.

No. 4. State whether or not you personally inspected or examined individual bags of flour discharged from the steamer "Sweepstakes" and consigned to Cia. Luz Stearica.

Fourth—To the Fourth Cross-Interrogatory he says:

No.

No. 5. In connection with your answers to direct interrogatory No. 10 and direct interrogatories No. 30 and 31, please state whether or not it is possible that the flour shipment was damaged, dampened or wetted upon discharge from the steamer "Sweepstakes" at Rio de Janeiro without such [211] fact being known to you until receipt of notice of claim from the consignee.

(Deposition of Alick Caswell.)

Fifth—To the Fifth Cross-Interrogatory he says:

I think it is extremely unlikely that any extensive water damage could have escaped my attention, the attention of the stevedores, tally clerks and docks and customs house personnel.

No. 6. Is it not a fact that all, or practically all, shipments of flour discharged at Rio de Janeiro must be transported in the same or similar manner to consignee's premises from dockside, either after passing through Customs Warehouse, or without passing through Customs Warehouse?

Sixth—To the Sixth Cross-Interrogatory he says:

Quantities of flour are discharged to docks warehouse for delivery to customs; after duties are paid, delivery is taken by consignee as they require. Equally, quite a number of consignees take delivery direct from alongside; this especially applied during the period of congestion of docks warehouses as ruled when the S. S. Sweepstakes was in port. In cases of flour being discharged to customs warehouses, I am unable to state whether consignees normally take their flour away by rail car or by truck, or where they take it.

No. 7. Please state the date and hour on that day when your records show that discharge of the shipment of flour from the steamer "Sweepstakes," consigned to Cia. Luz [212] Stearica, was completed.

Seventh—To the Seventh Cross-Interrgatory he says:

I am unable to answer this question without consulting our records.

(Deposition of Alick Caswell.)

No. 8. Did you receive the original of the attached letter from Cia. Luz Stearica, dated March 2, 1948, and marked for identification as Exhibit 6? Eighth—To the Eighth Cross-Interrogatory he says:

(Exhibit 6 was not received.)

I am unable to answer this question, inasmuch as Exhibit 6 is missing.

* * *

No. 11. Did you or your representatives inspect the flour after arrival at consignee's warehouse and receipt of notice of damage claim?

Eleventh—To the Eleventh Cross-Interrogatory he says:

No.

No. 12. Did you or your representatives request an opportunity to inspect all or any portion of the flour after arrival at consignee's warehouse and after your receipt of notice of damage claim?

Twelfth—To the Twelfth Cross-Interrogatory he says:

No.

No. 13. Were either you or your representatives denied the opportunity to inspect the flour after arrival [213] at consignee's warehouse and your receipt of notice of damage claim?

Thirteenth—To the Thirteenth Cross-Interrogatory he says:

No.

* * *

(Deposition of Alick Caswell.)

No. 16. Was a chemical analysis obtained of any samples taken from the flour?

Sixteenth—To the Sixteenth Cross-Interrogatory he says:

Not by Moore-McCormack.

* * *

No. 18. If no samples were taken by you or your representatives of the flour after arrival at consignee's warehouse and your receipt of consignee's notice of damage claim, please state why samples were not obtained and explain in detail.

Eighteenth—To the Eighteenth Cross-Interrogatory he says:

We did not survey the flour; therefore, we did not take samples.

No. 19. State with whom you have discussed the testimony you are now giving, either in person or by written communication, and state also when you discussed it on each occasion that you discussed it.

Nineteenth—To the Nineteenth Cross-Interrogatory he says:

I have not discussed it with anyone." [214]

Mr. Wakefield: I would like again, if the Court please, to mention in connection with this deposition of Mr. Caswell—

The Court: Before you mention that, is it not your desire to have this deposition received in evidence as a part of respondent's case in chief?

Mr. Wakefield: Yes, Your Honor.

The Court: It is so ordered.

Mr. Wakefield: In Libelant's Exhibit 3, consisting of two letters, one dated March 2 and the other one March 9, which were offered and admitted yesterday without objection on my part, I call attention to the fact that those letters were referred to in this deposition on cross-examination under interrogatory No. 8, but the exhibit was not transmitted with the interrogatories and the witness was unable to answer it. I want that to be stated so it wouldn't appear that the witness had denied writing the letter.

Mr. Howard: In that connection, if the Court please, the witness did further testify that he was not able to produce the letter because part of his file was in New York.

The Court: Let the record show those things. Call the next witness.

Mr. Wakefield: If the Court please, on the question [215] of the chemical analysis, and the testimony of Dr. Barreto offered by the libelant yesterday, the respondent would now like to call Mr. Williams, and to request permission for Mr. Crutcher to examine this witness, all of which goes to the issue of the salt water and chemical testimony.

The Court: The request in all respects is granted.

THOMAS WILLIAMS

called as a witness by and on behalf of respondent, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Crutcher:

Q. Will you state your name to the Court?

A. Thomas Williams.

Q. Your profession is what? A. Chemist.

Q. Are you a resident of Seattle?

A. Yes, sir.

Q. What is your business? [216]

A. I am a partner of Northwest Laboratories, a chemical laboratory.

Q. Will you state some of your professional qualifications?

A. I graduated with a Bachelor of Science degree in chemistry, and have participated in the field of chemistry for—ever since 1934, fifteen years.

Q. Do you have a professional engineers' license?

A. I am registered in the state of Ohio as a professional chemical engineer. I have not registered in the state of Washington, although the license is reciprocal. I am registered in the National Society of Professional Engineers.

Q. In the course of your professional duties, do you have occasion to make analyses of various substances and matters? A. Yes.

Q. Have you had experience in analyzing grains and cereals? A. Yes, sir.

(Testimony of Thomas Williams.)

Q. Have you ever had occasion to make analyses for contamination by sea water?

A. We have analyzed cereal feeds for possible contamination of salt water.

Q. Is the problem of analysis in such matters similar [217] or akin to that in analyzing wheat flour?

A. Similar, I would say.

Q. Do you consider yourself qualified to make analyses of salt water contamination of wheat flour?

A. Yes, sir.

Q. Showing you Libelant's Exhibit 4, purporting to be a chemist's report, by Dr. Barreto, I ask you whether you have heretofore examined a copy of that report?

A. I have.

Q. And the translation thereof?

A. Yes, sir.

Q. I ask you whether you have also examined the copy of the questions propounded to Dr. Barreto and the answers, being in the form of a deposition in this proceeding?

A. I have reviewed that, yes, sir.

Q. Before proceeding with an analysis of that report, would you please explain to the Court in a few simple words the essential difference between a qualitative and a quantitative analysis from a chemist's viewpoint?

A. A qualitative analysis is for the discernment of the product, an element or a compound. That is distinguished from a quantitative analysis in that a quantitative analysis determines the amount pres-

(Testimony of Thomas Williams.)

ent and is reported in terms of a quantity. A qualitative analysis in no sense indicates quantity of material. [218]

Q. With reference to the elements of sodium and chloride or chlorine, I ask you whether you have examined technical works or are otherwise familiar with the content in wheat flour of those elements?

A. Yes, I have reviewed references.

Q. Would you state what your references indicate with respect to the content of wheat flour as to sodium and chloride?

A. In Winton, the amounts are very small. The largest quantity of chloride present in the ash from wheat flour that I was able to find was .11 per cent. That is based on the ash content of the flour. That was reported by Winton. I have the reference, if you want it.

Q. That is sufficient. Is it true or not true that wheat flour normally contains both sodium and chloride or chlorine?

A. Yes, it contains both sodium and chloride.

Q. In order to determine whether or not wheat flour is contaminated with sea water or fresh water or is not contaminated with either one of those elements, and having reference to the quantity or presence in the sample of chloride and sodium, would a qualitative analysis, in your opinion, be a sufficient test to disclose the nature of the contamination?

A. A qualitative could not be considered as positive [219] evidence.

* * *

(Testimony of Thomas Williams.)

Q. In the chemical profession, is there any standard which might be denominated international so far as procedure in reporting the results of analyses is concerned, if you know? [220]

A. Basically, we have certain universal systems. Chemistry is a universal science, it is not limited to any one particular locality. Reports are first of all reported in terms of percentage, and procedures are standardized. We have such standards as ASTM, which is the American Standard for Testing Materials.

Mr. Howard: I believe he has answered the question, and what he is now speaking is beyond the scope of the question.

Q. That is sufficient. In the testing of cereals for contamination, if you know, is there any accepted or authorized method of procedure applicable to the chemical profession throughout the world?

A. I am sorry, I didn't understand your question.

Q. If you know, would chemists in another country use procedures which would likewise be used by chemists in this country in seeking to determine the nature of contamination of wheat flour?

Mr. Howard: If you know.

A. Well, there is a question here—may I sort of go a little off the subject?

Q. You may explain the basis of your answer.

A. Actually, there isn't just one test that you can use to discern contamination. That is a loose

(Testimony of Thomas Williams.)

term, to start with. You are discussing here the contamination of [221] flour with salt water or sea water. One of the tests that we would use would be the discernment qualitatively and quantitatively of sodium chloride, which is a constituent of sea water. It would be one of the steps you would take. I am not certain it would be the only step, but it would be one of the steps.

Q. That would be regardless of the country in which the chemist was doing his work?

A. Regardless of the country in which the chemist was doing his work, the procedure would be standard. There are accepted methods in any country of the world for doing that.

Q. Are those accepted methods set forth in any book or series of books?

A. As far as I know, yes. We have our official Methods of Agricultural Chemists, which is published in every civilized country in the world. It is accepted as a standard.

Q. Have you had occasion to examine reports of chemists from other countries?

A. I have had no occasion to for a——

Q. I hadn't quite finished my question. Either in the course of your own business or in chemists' professional journals?

A. In the course of our business, we have to be familiar with the activities in other countries, and it is [222] quite commonplace to review the literature from France, Germany, Sweden and other for-

(Testimony of Thomas Williams.)

eign countries, South America being one of them.

Q. Referring again to the exhibit before you, being the report of Dr. Barreto, would it appear to you as a professional chemist that such report is the report of a qualitative or a quantitative analysis?

A. This is a qualitative analysis.

Q. Will you state your reasons for so concluding?

A. The reason for so stating that is because no quantitative data has been presented. There are no quantities of materials indicated.

Q. In what form would the report be had a quantitative analysis been conducted?

A. Well, you would have discerned percentage composition, the percentages of the constituents that he analyzed for. For instance, sodium chloride would have been reported in terms of percentage.

Q. Is there any question in your mind about that?

A. No question whatsoever.

Q. Referring to Dr. Barreto's report, do you recall whether therein he states that he separately examined the sack fabric from samples?

A. I must confess that I believe I recall that.

Q. Assuming that he did so, that in Dr. Barreto's deposition he stated he did, would there be a separate report of the results of the examination of such fabric?

Mr. Howard: I object. He says, "would there be a separate report." That is very tenuous, it seems to me. The report speaks for itself. What this wit-

(Testimony of Thomas Williams.)

ness might do in making a chemical analysis and report might be entirely different from what a chemist in Rio might do. Furthermore, this witness might have some particular basis by reason of his experience locally that would afford a reason why he would answer this question one way or another. I see no basis for such a question being asked this witness.

Mr. Crutcher: I withdraw the question. I think the objection is properly taken.

Q. Assuming that a professional chemist acting according to accepted standards in the international chemists profession had made a separate examination of sack fabric, would he in the normal course of events, that is, if you know, report the contents of such an examination separately?

Mr. Howard: If the Court please, my objection runs also to this question for the same reasons, asking this witness to assume that a separate examination was made. Now, counsel is asking whether he would expect such a chemist to make a separate report of bag samples. I say that depends entirely on the conditions of the [224] survey, the circumstances under which it was made, the nature of the request for the survey, and how extensive a report was expected or requested from the person obtaining the survey.

The Court: The objection is overruled.

The Witness: In determining the fabric, that is one separate part of the whole here. It is quite

(Testimony of Thomas Williams.)

probable to presume that the fabric could be contaminated with salt from the spray or salt water.

Mr. Howard: The witness is now deviating beyond the scope of the question.

The Court: Sustained.

Q. Referring to Dr. Barreto's deposition, do you recall whether he stated therein that he made a separate analysis of sound flour from the same shipment? A. I believe he did.

Q. Again referring to the standard among professional chemists prevailing throughout the civilized world, state, if you know, whether a report of comparative analysis, that is, comparative quantitative analyses, would in the normal course of events as a matter of professional practice be reported separately?

Mr. Howard: Same objection, if the Court please. What might happen in the normal course of events is not determinative of what is proper in this case. There [225] may have been a request for a separate analysis on sound flour, or a separate report, and that would be covered, I submit to Your Honor, entirely apart from any standard that may be prevailing throughout the world. If the client or customer requested a separate analysis or report, it seems to me it is obvious that would be the determining basis of whether such a report was submitted.

Mr. Crutcher: My response is that Dr. Barreto in his deposition did testify that he made a separate

(Testimony of Thomas Williams.)

comparative analysis both of flour deliberately contaminated with sea water, and I believe on cross-examination he stated he made a separate analysis of sound flour.

I offer to prove by this witness that sound professional procedure, irrespective of nationality, of chemists requires that.

Mr. Howard: You are making an offer of proof now?

Mr. Crutcher: That is correct.

Mr. Howard: The Court has not ruled on the objection yet.

The Court: The objection is overruled.

Mr. Howard: The question, as I recall, said "in the normal course of events."

The Court: Read the question. [226]

(Last question read by reporter.)

The Witness: Yes, sir.

Q. Making the same assumption, would an analysis of flour deliberately contaminated by sea water be separately reported? A. Yes, sir.

Q. Referring to the distinction between a qualitative analysis and a quantitative analysis, is a qualitative analysis, in your opinion as a professional chemist, a safe basis for determining whether flour has been contaminated with fresh water or salt water?

Mr. Howard: If the Court please, libellant objects to this question because it calls for an opinion based upon an opinion. In other words, this witness,

(Testimony of Thomas Williams.)

who has qualified as an expert chemist practicing locally in the city of Seattle, is now called upon to pass an opinion on the opinion of the witness down in Rio de Janeiro, Dr. Barreto, the chemist. I submit to Your Honor that is entirely within the province of the trier of the fact, and is not a proper subject for the examination of an expert witness.

This witness can be asked what he might do, or what tests he might make, but he is now asked a question which calls for an opinion as to the validity of someone else's opinion. I submit that is entirely improper. [227]

Mr. Crutcher: My response is that I believe counsel misapprehends the purport of the question. I am asking the witness as a professional chemist whether in his opinion, and entirely aside from the facts in this particular case, it is reliable to depend upon qualitative analysis alone to determine whether contamination is fresh water or salt water.

The Court: The objection is sustained, with leave for you to determine from the witness how he would determine the facts which you think are material for the chemist professionally to ascertain.

Q. What is the method normally employed in the chemical profession at large to make a qualitative analysis of some cereal matter contaminated with sea water?

A. Do you want me to recite the qualitative procedure?

Q. Very briefly, yes, with reference both to sodium and chloride.

(Testimony of Thomas Williams.)

A. Sodium is determined by the flame spectra, ashing the material and then conducting the flame test. It is best and generally necessary in order to get a positive answer to view the flame with a spectroscope, even a small utility spectroscope. That will distinguish the presence or absence of sodium.

The test for chloride is conducted by means of its reaction with silver nitrate, whereby white precipitate in [228] solution is discerned if chlorides are present.

* * *

Q. If the problem were presented to you as a professional chemist to determine whether flour had been contaminated by salt water or some other type of water, would you be content with conducting the tests which you have just described as a basis for making a report to a client in your professional capacity? A. No.

Q. Would you state your reasons for that answer?

A. It is necessary, in order to prove a conclusion, to report and show quantitative data. It is necessary to do that—if you want me to elaborate somewhat—to determine the quantity of sodium and the quantity of chloride to make certain that they are in combination as sodium chloride, among other things. [229]

Q. Do you have occasion to correspond with other chemists and ask analyses from them and transmit analyses to them? A. On occasion.

Q. If a report such as that which has been shown

(Testimony of Thomas Williams.)

to you were furnished, would you consider that because it had been rendered by a professional chemist that it was adequate, an adequate basis for the conclusion drawn by Dr. Barreto at the conclusion of that report:

Mr. Howard: I object to that question.

The Court: Sustained. I think you had better change the line of inquiry. Stay away from asking this witness to comment upon the validity or carefulness or thoroughness of other witness' testimony.

Mr. Crutcher: Your Honor, I recognize that in the ordinary course of events such testimony is not admitted. This is a peculiar case in that the only opportunity that we had to cross-examine Dr. Barreto as to his skill or credibility was by means of cross-interrogatories, which, as Wigmore has recognized, are quite inadequate in the case of technical experts.

The evidence that we are considering goes to the very heart of this case, because if Your Honor finds that the contamination was by sea water, it casts upon us the strong burden. In fact, for practical purposes, [230] the vessel's liability is determined. The only basis for concluding that this damage resulted from sea water is Dr. Barreto's analysis. As has been heretofore indicated in the testimony, the ethics of the report are open to strong doubt. This is a matter within Your Honor's discretion, I recognize, but I feel that the evidence is important and should in the exercise of your discretion be admitted.

(Testimony of Thomas Williams.)

My authorities are very limited. In 58 Am. Jur., Sec. 677, under "Witnesses," it is stated that, "While the credibility of a witness is ordinarily to be tested by cross-examination, it may be proper to do so by the testimony of an expert especially qualified in respect to the subject matter." It is further noted in that section that the scope of such examination rests "* * * in the sound discretion of the court."

There are two points that can be brought out by such testimony. One affects the credibility of the report of Dr. Barreto and his subsequent testimony to things which do not appear in his report. The other concerns his skill as a chemist.

The Court: The objection is sustained. The ruling will stand.

Q. On the basis of Dr. Barreto's report, referred to as Exhibit 4, is it possible for you as a professional [231] chemist to conclude that the damage in this case was due to sea water?

Mr. Howard: I object to that question for the same reason. It invades the province of the trier of the fact. It is up to the trier of the fact to weigh this testimony.

The Court: Read the question.

(Last question read by reporter.)

Mr. Crutcher: Perhaps to that should be added "to the exclusion of any other type of water."

Mr. Howard: I submit to Your Honor that is a question to be determined by the Court.

(Testimony of Thomas Williams.)

The Court: The question is not in proper form. First find out whether or not he could make such a determination. Then it is a question later as to whether or not he may be able to state what his determination is.

Q. Would it be possible for you to conclude from Dr. Barreto's report, which is before you as Exhibit 4, as a professional chemist to conclude to your own satisfaction that the damage with which we are concerned in this case was the result of sea water or some other type of water?

Mr. Howard: Same objection.

The Court: The objection is sustained, with leave to ask the witness whether or not he can tell from that [232] report whether or not the damage was due to sea water or some other kind of water.

Q. Can you tell from that report which is before you as Libelant's Exhibit 4 whether the damage in this case was due to sea water or some other type of water?

The Court: The answer should be yes or no.

The Witness: No.

Q. Would you state the reason for that answer?

A. Because of the lack of quantitative data to support such conclusion.

Q. Turning briefly to other questions, in the management of a chemist's laboratory, is there such a thing as a standard practice with reference to the retention of records relating to analyses?

Mr. Howard: I object to that unless the witness

(Testimony of Thomas Williams.)

is asked whether he is familiar with what the standard practice is at the Port of Rio de Janeiro, Brazil.

Mr. Crutcher: I asked whether there was such a thing as a standard practice among professional chemists.

The Court: Is this the same kind of practice you previously inquired about?

Mr. Crutcher: No, Your Honor. My point now is——

The Court: You had better develop the witness' knowledge as to this particular kind of standard you are talking about. If you have not previously gone [233] into it, qualify him as to this particular standard.

Q. I ask you whether you know if there is a standard practice among professional chemists throughout the civilized world with respect to the retention of records of analyses made?

Mr. Howard: I renew my objection unless the question is directed to what the practice is at the Port of Rio de Janeiro, Brazil, or other Brazilian ports.

Mr. Crutcher: Your Honor, I asked whether there was a practice standard to the chemical profession throughout the civilized world. If Rio has a peculiar custom, that is a proper subject for cross-examination, I should think.

The Court: You may ask the question. The objection is overruled.

(Testimony of Thomas Williams.)

Q. Answer yes or no.

A. I can't answer the question yes or no, except by saying that normal practice in laboratories in this country, to the best of my knowledge, is to retain records until they believe them to be no longer of any value.

Q. But you do not know whether that practice extends to other countries?

Mr. Howard: I move to strike the last part of his last answer as not responsive.

The Court: It is stricken and the Court will disregard [234] it.

Q. Do you know whether there is any standard practice such as we have been talking about with respect to retention of samples?

Mr. Howard: Same objection.

The Court: It is sustained. Suppose there was such a one and the witness Barreto didn't do it, what difference would it make?

Mr. Crutcher: It would tend to indicate that either the sample or test record had been suppressed, or that he is not the type of a professional man who does what other normal chemists do. Our point is that—well, that is a matter of argument.

Mr. Howard: I understand there is no question to the witness now.

The Court: That is my understanding.

Mr. Crutcher: That is correct. That is all for the respondent.

(Testimony of Thomas Williams.)

Cross-Examination

By Mr. Howard:

Q. When did you review the Barreto deposition?

A. This last week. I was given the report on the 25th of October.

Q. Do you recall this question having been asked of [235] Dr. Barreto, "Were separate analyses made on the flour samples and upon the bags or packing material in which the flour was contained?" to which Dr. Barreto's answer was, "Yes"? Do you recall that?

A. Not too well, sir. I just read it over once. I would have to review it again to make certain of that.

Q. Do you recall this question having been asked, "Was a comparative analysis made of the samples of flour submitted to you by Companhia Imobiliaria Financeira Americana S. A. and other flour intentionally contaminated by salt water?" to which the witness answered, "Yes, I always make this comparative test for all kinds of analyses." Do you remember that?

A. Yes, I do remember that.

Q. Do you recall this question having been asked, "Did you make a quantitative examination of both the damaged and undamaged flour?" to which the witness responded, "Yes."? Do you remember that?

A. I believe so.

(Testimony of Thomas Williams.)

Q. On the basis of those questions and answers propounded to Dr. Barreto, and refreshing your memory as to those, are you still of the opinion that the report and the translation of the report, being Libellant's Exhibit 4, is insufficient to establish salt water damage to a shipment where the chemist in making the report has said, "By the [236] result of the above analysis, I conclude that the damage ascertained must be attributed to salt water"?

A. "Above analysis" is not sufficient to come to any conclusion of that kind.

Q. Does the sodium and chloride content of wheat flour vary in different grades of flour?

A. From my references, yes.

Q. Is there an appreciable variation or a minor, slight variation?

A. At most, the chloride content is in minute quantities. It does vary. At most, the chloride content of ash from flour is present in small amounts, and does vary, according to the literature.

Q. Is the variation large or small?

A. Well, in terms of the amounts, it is large.

Q. Can you illustrate that?

A. One ash is reported as having .11 chloride content; another is reported as having none.

Q. What is the text that you are referring to on that?

A. B. Wiley Winton, Vol. 1, 1932, p. 238, Structure and Composition of Foods.

Q. As I understood your testimony on direct

(Testimony of Thomas Williams.)

examination, you said that a qualitative analysis was not positive evidence of salt water damage, is that correct? A. That is correct. [237]

Q. In making the test for the sodium content of a suspected sample of any commodity such as flour or other cereal, will you describe to the Court what you would observe visually on a qualitative analysis by the flame test of ash when it is burned?

A. You should exhibit a well-defined spectrum in the flame of the ash.

Q. What color?

A. Yellow, a yellow flame.

Q. State whether or not color and intensity of that flame would vary according to the content, the quantity of sodium in the sample?

A. Possibly so. It is almost impossible to discern visually, however.

Q. Have you ever made a comparative analysis by the sodium flame test of samples of a suspected cereal as between fresh water and salt water contamination? A. No.

Q. Have you ever had any occasion to observe whether there was a difference in the intensity or color of flame on the sodium flame test of samples intentionally contaminated with salt water and fresh water?

A. I have never conducted a test myself, sir, in that respect.

Q. You are unable to give an answer as to whether there [238] would be any difference in the color and intensity of the flame on such a test?

(Testimony of Thomas Williams.)

A. I am, yes.

Q. You mentioned a silver nitrate test as being the method that you would adopt for testing for chloride in a suspected sample on a qualitative procedure?

A. Yes, sir.

Q. Is that otherwise known as the Volhard process?

A. There is a distinction between that and the Volhard process. The Volhard employs as a reagent, one of its reagents, silver nitrate.

Q. Is the Volhard process a qualitative or quantitative process?

A. A quantitative test, it is used as a quantitative measure. It could be construed, however, to be either one, but as I say, our practice is using Volhard's method as a quantitative test for chlorides.

Q. Do you recall Dr. Barreto having testified in a deposition that he used the Volhard method for determining the chloride content of suspected samples in this shipment?

A. Yes, sir.

Q. Then you would construe that to be a quantitative test?

A. The Volhard test is generally used as a quantitative test. [239]

Q. It can also be used as a qualitative test?

A. It can also be used as a qualitative test.

Q. Do you consider use of the Volhard process qualitatively and the sodium flame test would be reliable for the determination of whether or not a

(Testimony of Thomas Williams.)

suspected sample was contaminated with salt water or fresh water?

A. If the Volhard method was used, its only expression would be in terms of percentage data.

Q. Didn't I understand you to say that you could use the Volhard process qualitatively?

A. If it is used qualitatively——

Q. Would you like that question read back?

A. Yes, please.

(Last question read by reporter.)

A. In my opinion, it is necessary to know quantities of material, both in terms of sodium and chloride, before you can come to such a conclusion. They are present in quantity, yes, but you have got to have a comparison expressed in terms of quantity in order to come to some conclusion.

Q. Are you acquainted with the Barreto process?

A. I am not.

Q. Have you had any occasion to research in the chemical texts or encyclopedias or other chemical authorities to determine what the Barreto procedure consists of?

A. No, sir. [240]

Q. Having in mind that the deposition of Dr. Barreto states that he used the sodium flame test for the determination of sodium content in suspected samples; that he used the Volhard process as well as his own process for determining the presence of chlorides in the suspected samples; having in mind also that Dr. Barreto has testified in his sworn deposition that he tested both

(Testimony of Thomas Williams.)

suspected samples, the samples intentionally contaminated with salt water, and that he also made comparative analyses of samples of good marketable flour and samples that had been damaged in this shipment; having in mind also that Dr. Barreto says that he tested these samples quantitatively as well as qualitatively, would you now care to express an opinion as to the reliability of the conclusion of Dr. Barreto as shown in his report?

Would you like to have the question read back?

A. I believe I understand the essence of your question. My opinion is that competency would necessarily include quantitative data in order to support his conclusion. Presumably, Dr. Barreto has testified that he did conduct quantitative data. My only opinion is, why didn't he report it? In any legitimate report, in my own experience, it is necessary to prove what you have to say, and our only proof in analytical chemistry is by the presentation of quantitative data. That is our only way of proving anything we say. [241]

Q. Assuming that Dr. Barreto did make quantitative as well as qualitative tests and comparative tests on good samples and others, would you then consider that his opinion based on such tests was reliable?

A. I don't think opinion is the necessary—is the thing to go on. You don't have to express an opinion.

Q. May I rephrase the last part of the question

(Testimony of Thomas Williams.)

to say that his findings based on such tests would be reliable? A. Yes.

Mr. Howard: That is all.

Redirect Examination

By Mr. Crutcher:

Q. You stated that the results of a Volhard test used quantitatively are usually expressed in terms of percentage. Does Dr. Barreto's report in front of you indicate that the Volhard test is used?

A. This report before me does not imply that Volhard's method was used, no, sir.

Q. If Dr. Barreto had used quantitative procedures in making the analyses reported in the report before you, wouldn't he have shown the percentages that he found?

Mr. Howard: I object to that question, Your Honor, as calling on this witness to speculate as to what is in the mind of the man who makes the report down in [242] Rio de Janeiro, "Wouldn't he have shown that." That is certainly searching the mind of the person who made the report and is not a proper subject for any expert witness.

Mr. Crutcher: My point is, Your Honor, that the witness has testified that a quantitative result from the Volhard test is expressed in terms of percentages. He has stated that the report does not indicate that the Volhard process was used. My question is, if he did use a quantitative procedure to determine the amount of sodium, is there

(Testimony of Thomas Williams.)

any other way to report a quantitative analysis other than in terms of percentages?

The Court: The objection is overruled.

The Witness: There is no other way of expressing quantitative data, other than by percentage composition.

Mr. Crutcher: That is all.

Recross-Examination

By Mr. Howard:

Q. The Barreto report doesn't show any of the procedures that were used, the Volhard procedure or any other, does it?

A. The presumption when you report—such a report as this is that it is qualitative, which implies the use of qualitative procedures, standard. [243]

Q. My question was that the report as you have it before you, a translation of it, does not show what procedures were used at all, the Volhard or otherwise?

A. Sir, it is an analysis. It must be one of the two, qualitative or quantitative.

Q. I am speaking of procedures.

A. Well, qualitative implies procedures.

Q. Does it show whether a sodium test was made?

A. Yes, sir.

Q. How do you determine that?

A. The fact that it is reported here sodium is present.

(Testimony of Thomas Williams.)

Q. It does not show that the flame test was used for determining sodium, does it?

A. Not necessarily. It could have been one of only two possible procedures that you can use for sodium. The flame test is the only qualitative test for sodium—I beg your pardon, other than rather involved specific reagents which I can say with good probability were not used.

Q. You are not acquainted with the Barreto test procedure?

A. From Barreto's testimony, the reference he refers to is quantitative, by his own testimony.

Q. Quantitative?

A. Yes, he implies that is quantitative.

Q. Are you aware of the fact that the Barreto test is [244] published in two well known volumes of chemical authorities and used in this country?

A. That is what the deposition says.

Q. You have not checked that?

A. No, sir.

Mr. Howard: That is all. [245]

* * *

The Court: You may step down.

(Witness excused.)

JAMES GOW

called as a witness by and on behalf of respondent, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Wakefield:

Q. You are Mr. James Gow?

A. Yes, sir.

Q. A marine cargo surveyor?

A. Yes, sir.

Q. What has been your experience in marine cargo work?

A. I became a marine surveyor in 1922.

Mr. Howard: If the Court please, I am willing to admit the qualifications of Mr. Gow as an expert witness in marine cargo matters in the Northwest area.

Q. In connection with your work as a marine cargo surveyor, have you on frequent occasions dealt with damage to sacks of flour?

A. Yes, sir. [246]

Q. Flour contained in cotton bags?

A. Yes, sir.

Q. Carried aboard ships? A. Yes, sir.

Q. Has that experience included bags of flour that were damaged by water?

A. Yes, sir.

Q. Salt water and fresh water?

A. Yes, sir.

(Testimony of James Gow.)

Q. In this same connection, damaged flour taken off ships, have you had experience in the reconditioning—or the determination, I should say, of the extent of damage sustained by that flour as a result of wetting? A. Yes, sir.

Q. Have you actually had charge of and reconditioned flour that has been wetted?

A. Yes, sir.

Q. Based upon your experience and general knowledge of flour, wetted flour by salt water or fresh water; and assuming that there was a shipment of 10,500 bags of fifty kilo weight, which is 110 pounds, discharged from a vessel at Rio de Janeiro; and that some five to ten days after discharge, upon arrival at the warehouse of the consignee, it is discovered that 3087 bags of this flour have spots of wet and caked flour on the bags, such spots being of varying [247] sizes and on varying locations on the bags—by that I mean the tops, bottoms or the ends—but without any regular pattern as to location or the size of the spots, and that in the spots themselves the penetration of the dampness or the caking extends for a maximum distance of 5 cm.; and on those facts as to that flour and those 3087 bags six sacks are selected at random from the 3087, which six sacks are inspected visually, and the depth of penetration as indicated is determined with respect to some of those six bags and certain samples taken from those six bags, but no segregation of sound and damaged flour is

(Testimony of James Gow.)

made as to those six bags or any other bags of damaged flour: tell me whether in your opinion it is possible for you or any other marine surveyor or anyone else to arrive at an accurate or anywhere near accurate percentage of damage in those damaged bags in that way? A. No.

Mr. Howard: Libelant objects to that question on the basis of the assumption by counsel, which may be based on part of the testimony, but there is other testimony to other extent as to spots of wet and caked flour, and I call counsel's attention particularly to the statement in the sworn deposition of Mr. Ferreira, "The damage varied; some bags were wet on top, others on the bottom or sides, and others completely wetted." [248] I think any assumption should be based upon the evidence in the record, and I think that is evidence that should be included in the hypothetical question.

Q. Let's make the amendment that counsel has just read to my question, that some bags were wet on top, others on the bottom or sides, and others were completely wet; What is your opinion with respect to the possibility of making an estimate of damage, extent of damage to such 3087 bags of flour?

A. I would think the quantity—the number of bags that were examined was six bags?

Q. They examined six bags, yes.

A. I would say the quantity was too small to determine the extent of damage.

(Testimony of James Gow.)

Mr. Howard: Your question was six sacks were selected from the damaged portion. I again call your attention to the testimony of either Dr. Barreto or Mr. Ramos to the effect that 20 bags were examined and six were tested.

Mr. Wakefield: No, there is no such testimony.

The Court: The question may stand in its present form.

Mr. Crutcher: I believe Dr. Barreto testified to an examination of 20 bags on cross-examination, without qualifying himself as the surveyor. [249]

Mr. Howard: Here is the answer I am referring to, "Thirty-five per cent was of the bags I saw in the storehouse. I saw only damaged bags; thirty-five per cent of the flour in the damaged bags was spoiled. I looked at about twenty of the bags taken from the damaged lot and concluded that the percentage of damage was thirty-five per cent."

The Court: You may amend the question accordingly.

Mr. Wakefield: That isn't in accordance with Mr. Ramos' testimony, the surveyor, I have never heard of 20 bags, and I have been on this case for a year now.

The Court: If I had heard it, I confess it had slipped my mind also.

Mr. Crutcher: It is also true in that connection that Dr. Barreto did not qualify himself as a marine surveyor, or have any capacity to estimate damage.

Mr. Wakefield: That is true, Dr. Barreto doesn't

(Testimony of James Gow.)

qualify as a surveyor nor purport to be one. Mr. Ramos is the one who took the samples and selected the six bags at random, and if this man looked at 20, he doesn't say he opened 20. He says, "I looked at about twenty of the bags taken from the damaged lot . . ." and someplace else says something about six.

Mr. Howard: He did previously say he took samples from six bags. He later says he looked at 20 bags. [250]

Q. With that amendment—and I am not admitting that there were 20 bags, but Dr. Barreto, the chemist, said he looked at 20 bags, the surveyor selected 6 bags—I will ask you whether in your opinion it was possible for a surveyor to arrive at a percentage of damage over the 3087 bags on the basis of such an examination?

A. In my opinion, it would not be.

Q. If you had damage to 3087 bags, what in your opinion would be the minimum number of bags you would have to examine to arrive at any conclusion as to damage?

A. In view of the statement made that the damage to these bags was varied, varying in size, varying in the area of the bag, I would say you would have to take about 20 per cent in order to be—and then you might even go beyond that, for the reason that you would have to consider that some bags in a larger area, you would have to make a segregation to come up with how many bags had small areas

(Testimony of James Gow.)

and had large areas. You couldn't just take a few bags and say the rest of them are all like that.

Q. In any survey of damaged flour by water, what would you consider in your opinion to be the very minimum percentage of bags to be examined in order to obtain a fair test or survey?

A. The very minimum?

Q. Yes. [251]

A. I would say 10 per cent.

Q. Reverting back to the hypothetical question which I put to you a moment ago, namely, the 3087 bags with the character of damage detailed, to wit, the spots on the sides and ends and some bags totally submerged, I will ask you whether in your experience in dealing with wetted flour it would be possible for there to have been as much as 35 per cent damage to those bags of flour?

Mr. Howard: I object to that question. This witness cannot testify as to what was possible. He did not see the bags, according to any evidence that is in the case today. He is an expert. He has got to either testify from his own knowledge or else on the basis of assumptions that have not been made yet in the hypothetical question.

Mr. Wakefield: What assumptions?

The Court: I should think you should give him the assumed question, or else the objection is sustained.

Mr. Wakefield: I reverted to the first hypothetical question.

(Testimony of James Gow.)

The Court: Read the question.

(Last question read by reporter.)

The Court: The objection is overruled.

Q. Would you answer that, please?

A. Could I have the question again, please?

(Last question read by reporter.)

A. In my experience, in my opinion in handling flour I would say that was excessive.

Q. Can you tell us how much excessive?

A. Again expressing it as my opinion, and having handled flour which has been totally submerged, I would say that the damage—from what has been told to me to get a picture of this, I would say it wouldn't exceed 10 per cent.

Q. That the damage was what?

A. Wouldn't be over 10 per cent.

Q. Have you had an actual instance of bags totally submerged in salt water aboard a vessel which were later brought out of the vessel and re-conditioned and disposed of? A. Yes, sir.

Q. Which ship is this, by the way?

A. That was a ship called the Djambi.

Q. How many sacks of flour were wetted or totally submerged?

A. There was a large number of sacks, roughly ten or twenty thousand bags of flour in that hold that were wet. The particular lot of flour I handled represented around about 4,000 bags, 3,800 to 4,000 bags.

(Testimony of James Gow.)

Q. Did you actually segregate the damaged flour and sound flour in this Djambi case?

A. Yes, sir. [253]

Q. And you made an actual determination of the percentage of damage in this flour which was totally submerged?

A. Yes, sir.

Q. What were the results?

A. We separated the flour when the flour came out. It had been totally submerged. For that reason, we had entirely wetted bags. It wasn't a question of where you had a portion of the bag wet and a portion dry. We separated all dry bags and put them out. The rest was bags that had been completely under water. They were put in a warehouse and during the period of taking them out of the ship until we could make arrangements for handling, for the segregation, the bags dried out to a certain degree and became coated, and we knew from past experience we had had that the flour below the cake would be perfectly good.

The flour had been detained by the Government until such time as we could submit to them a reconditioning proposal, and on making that reconditioning proposal and method of handling the flour and getting their approval, we took the flour and reconditioned it by removing the damaged portion of the bag, and the caked portion, and recovered all of the good flour.

Q. What percentage of it did you recover?

A. In that particular instance, we recovered—the loss of flour was 5 per cent. [254]

(Testimony of James Gow.)

Q. That is in bags totally submerged in salt water, taken out and reconditioned, you only lost 5 per cent of the flour, is that correct?

A. That's right.

Q. And when you added to the loss of 5 per cent on these totally submerged bags the additional cost of reconditioning and charged that against the loss, how much did that bring?

A. It was less than 10 per cent.

Q. Based upon that, can you conceive of any possible basis from your experience upon which the sacks of flour as were discharged from the Sweepstakes, which I stated in my hypothetical question a moment ago with respect to spots and degree of penetration; can you think of any possible basis on which there could have been damage from water, salt water, to those bags to the extent of 35 per cent?

Mr. Howard: I object to that question, if the Court please, "any possible basis." I think the factors could be shown, and unless counsel presents the witness with some assumed fact on which he can base his answer, it is speculation on the part of the witness.

The Court: I am inclined to think the form of the question is objectionable. The objection is sustained.

Q. Have you ever had experience with damaged flour from salt water, either from spots of water on the sacks or [255] from total submersion in salt water, where the damage ran 35 per cent?

(Testimony of James Gow.)

Mr. Howard: Objected to as repetitious.

The Court: Overruled.

The Witness: No, I don't recall any flour that I ever handled, either spotted or totally submerged, that ran to that percentage of loss of flour.

Q. In your opinion, is it humanly possible for a surveyor or anybody that has had any amount of experience whatsoever to look at a lot of damaged flour, even assuming it has been totally submerged, all of it, in salt water, and state what the percentage of damage is to that flour without actual segregation of sound and damaged flour?

A. Absolutely not.

Q. Will you explain why?

A. Your gluten comes out of flour and seals the bag, makes a cake. Your water penetrates a given distance and your flour on the inside is perfectly good. Until such time as you remove the flour, the good flour out of that bag and can weigh it and determine what your recovery is, I don't see how you can arrive at what is good and bad, until you segregate the good from the bad.

Q. In your work as a cargo surveyor, do you have occasion and is it part of your job to examine the holds of vessels where cargo has been damaged for the purpose of [256] attempting to determine the possible cause of such damage?

A. Yes, sir.

Q. You say it is?

A. Yes, sir.

Q. And in determining the cause of damage, do

(Testimony of James Gow.)

you take into consideration the evidence of the damage on the cargo itself as a factor in arriving at your conclusion?

Mr. Howard: Objected to as leading.

The Court: Yes, it is. It is sustained. You can ask him what he took into consideration.

Q. What do you take into consideration when you are seeking to determine the cause of the damage to cargo, let's say by water?

A. We examine the cargo, to begin with, because that is what gives us the basis of our facts to look for the trouble. We first determine whether it is salt water or fresh water, not to the degree of salt, but we test it to find out whether or not it is salt, and the condition of the bag and the number of bags, and then we look in the ship's hold where the cargo was stored, and from there on we trace back to find the causes or conditions.

If it is fresh water, we look for fresh water conditions; if it is salt water, we look for conditions that would cause salt water damage.

Q. Assuming that a vessel carried 10,500 sacks of [257] flour in its tween decks Nos. 1, 2, 3 and 4, and also the lower tween deck No. 4; that the 10,500 sacks of flour were discharged from the vessel between the 22nd and the 25th of February, 1946; and that on the 2nd of March when the flour arrived at the consignee's warehouse it was found to have been damaged by spots on the bags of varying sizes and at varying places, with some bags totally wet,

(Testimony of James Gow.)

to the extent of 3087 sacks; state whether within your experience there is any possibility, in your opinion, of such damage as I have described having occurred aboard a vessel?

Mr. Howard: One assumption you have made is that the flour arrived at the consignee's warehouse on March 2nd. The only testimony on that that I can find that would have a bearing on it is that the cargo arrived at the consignee's warehouse between February 22 and March 1.

The Court: State your objection to the Court.

Mr. Howard: I object to the question, Your Honor, on the basis that it contains an assumption of fact that is not supported by the record in this cause, and that the testimony as to dates of arrival at the warehouse is as stated in Mr. Herold's deposition, between February 22nd and March 1.

Mr. Wakefield: If the Court please, at this time, in view of counsel's statement, before ruling on the question [258] I wish to offer in evidence the respondent's interrogatory No. 4 propounded to the libelant, which interrogatory No. 4 is as follows: "State the date when the cargo in question was received at the premises of the Libelant or its agent or representative or consignee."

The answer, served on me on March 10, 1948, a year and a half ago, "Interrogatory No. 4. March 2, 1946."

I offer that in evidence.

Mr. Howard: Your Honor, that wasn't in evi-

(Testimony of James Gow.)

dence at the time this question was propounded to this witness, and it is an answer to an interrogatory that was made on the basis of information that was available a year and a half ago, when the answers to the interrogatories were prepared. We have the testimony in the record of the checker who supervised admission of the flour to the consignee's warehouse, and it shows delivery of the flour between February 22 and March 1.

The Court: Who made the answer to the interrogatory?

Mr. Howard: Bigham, Englar, Jones & Houston and Merritt, Summers & Bucey, verified by Charles B. Howard, ". . . that affiant has been furnished with data upon which the foregoing replies to interrogatories have been prepared; that affiant has read said answers and believes [259] the answers to be true."

The Court: Does the Court have to take some other evidence, other than that answer, as to the fact, other than the answer made by you?

Mr. Howard: I submit the best evidence is the evidence in the record of the checker. It has not been controverted by anything respondent has brought in. He states the dates as between February 22 and March 1 for receipt at consignee's warehouse.

The Court: It seems to me the Court has no right to exclude the conditions stated by the interrogator, in view of that record.

(Testimony of James Gow.)

Mr. Howard: Your Honor, counsel has now offered that answer to the interrogatory in evidence. That was not in evidence at the time the question was propounded to the witness, and the only evidence we had in the record was this sworn testimony right here.

If counsel wants to offer that answer to the interrogatory in evidence, then we have two different dates. We have one date in the answer to the interrogatory of March 2, and we have this one of February 22-March 1, and I submit this is the best evidence, in the sworn testimony of the man who was there.

The Court: Do you wish to offer the interrogatory and the answer thereto in evidence? [260]

Mr. Wakefield: Yes, Your Honor.

The Court: It is admitted in evidence.

Mr. Wakefield: May I also say that counsel knows very well that the surveyor Ramos testified it was March 2. It was March 2 all through this testimony until a few days ago when this last deposition arrived.

Read the last question, please.

(Last question read by reporter.)

Mr. Howard: I renew my objection, for the purpose of the record. I do not believe the Court has actually passed on the objection.

The Court: Overruled. You may answer.

A. From the description of the damage to the bags, in my opinion, the water getting into the ship

(Testimony of James Gow.)

would not give the condition that these bags appeared in. In other words where a ship has a leaky rivet, and a deck rivet, or a leak in the plate, you get a concentrated water, a water flow to the scuppers. If the scuppers should be clogged, you will get an accumulation of water where it will wet a number of bags, and you get a number of bags above that area that will become wet by absorption. You do not get a sprinkling effect, where it has been described in this information as given that the bags are spotted to various degrees. You don't get that. You get that more from a sprinkling condition, rather than an actual condition of water coming from [261] above or the side of a vessel. If it comes from above, there would be an area of concentrated wetting.

The Court: It would not come from salt spray, from salt water coming aboard a ship?

The Witness: I can't say, Your Honor, how it would get there and cover the number of bags. It could cover a small number of bags right under a ventilator, but there is no chance of its spreading out over a large area and affecting the number of bags that are represented here.

Q. In addition to the assumptions of fact that I gave you in the hypothetical question just expressed, I will ask you to further assume, if you will, please, that this vessel in question had no cowl ventilators, that the ventilators were a forced system with both the intake and exhaust on top of the

(Testimony of James Gow.)

king posts, and with no ventilators on deck; and further, that the deck hatch covers were steel pontoons of the type with which you are familiar, I am sure, each covered with three tarpaulins: I will ask you whether, assuming those additional facts, there is any manner in your opinion and within your experience in which this cargo could have been damaged in the way it was damaged aboard ship?

A. Not to the condition described here, of scattered areas.

Mr. Wakefield: That is all. [262]

Cross-Examination

By Mr. Howard:

Q. Earlier in your examination reference was made to the possibility of there being 35 per cent damage to bags of flour by wetting. In your answers to these questions, have you been assuming that 35 per cent damage referred to quantity in the bag, 35 per cent of the total quantity in the bag?

A. I assumed it meant there was 35 per cent of the flour was damaged.

Q. Actually 35 per cent by weight was damaged?

A. Let me stop and think. I mean this way, that the assessment of damage—that the flour was damaged 35 per cent.

Q. Well, I have two answers from you. Now I would like to get this straight, do you mean 35 per cent damage by weight of flour in the bag?

A. Yes, I mean——

(Testimony of James Gow.)

Q. That is the assumption you were making?

A. Yes, 35 per cent of the flour was damaged.

Q. By weight? A. Yes.

Q. You are called upon many times to make a survey to determine the percentage of damage to a commodity such as flour on water shipments?

A. That's right.

Q. Is it not a fact that one thing that you [263] would consider, in addition to the actual quantity by weight or measure of the damage, would be the cost of reconditioning that commodity?

A. Yes.

Q. That would include labor and material necessary to recondition? A. Yes.

Q. And that would have to be calculated in determining the extent of damage? A. Yes.

Q. Isn't it a fact that in a commodity such as flour, would would also have to consider whether that flour that wasn't actually caked or wetted was damaged by tainting or smell?

A. Yes, that is possible. However, from my experience in handling flour, I have actually had flour where flour has been moulded on the bags before you could get to the point of removing the flour, that the bags have actually been moulded, and we have removed the top of the bag and taken the good flour out and have never found it tainted, and it has passed rigid Government inspections.

Q. It is a factor you have to consider, whether the contamination has affected it by taint or smell?

(Testimony of James Gow.)

A. We do consider it.

Mr. Wakefield: There is no evidence of that in [264] this case at all. I think it is improper cross-examination.

The Court: Overruled.

Q. Another factor that you would consider would be the mould or any fungus growth on the flour, wouldn't it? A. Yes.

Q. Wouldn't it be true that the increased moisture content in the flour that wasn't actually caked would have a bearing on your appraisal of the value of that flour that wasn't actually caked?

A. No, because in reconditioning the flour, the flour that cakes has absorbed the moisture. That remains as a hard cake on the bag. When you withdraw the flour from the bag that is free-running flour, it is just as good as the day it was made. I proved that in Tacoma in the Djambi case. After we cut the top off that bag and lifted it up very carefully so we wouldn't get any of the cake portion or mould in it, put that off to the side, turned the bags out and dumped the flour into a hopper that went down through a pipe into the bin, that flour was tested by chemists, tested by the state. I had my own chemists and we took sealed samples. The state tested it, I couldn't touch that flour until the state gave me permission. The state found nothing wrong with it. The flour was re-bagged, reshipped and sent to the consignee as a sound product. [265]

(Testimony of James Gow.)

Q. You would say there would be no increased moisture content, would not affect it?

A. It would not affect it.

Q. Isn't it a fact that in addition to the actual quantity by weight or measure of damage in a sack of flour, another factor that would have to be considered in determining the extent of damage would be the effect of damage on the market value of the product as a reconditioned product?

A. No, not in the case of flour, where the flour was handled by a reputable mill. That flour is either good or it isn't good. If it wasn't good and was proved not good, you couldn't sell it as flour. In this country, you couldn't sell it as good flour.

Q. In certain cases you might find it would be condemned so that it could not be used for human consumption?

A. If it had particles of mould, the Government won't release it. You can't even use it for animal food without special permission.

Q. Isn't that a condition that might exist in flour damaged by salt or fresh water?

A. I don't think so, because all damage adheres to the caked portion, not to the interior of the bag.

Q. You say that would have no effect on the market value, the fact that it was reconditioned flour?

A. No, sir, because in taking good flour and putting [266] it in new containers, you are leaving the damaged flour behind.

(Testimony of James Gow.)

Q. How do you test a shipment of flour, such as on the Djambi, for extent of penetration of wetness?

A. We would take a number of bags. First of all, the Djambi case, taking that, which is a very good example, that flour is entirely submerged. Therefore, we knew that all of the flour was wet. We also knew that it was mouldy. We knew we had a problem there. We would go into the bag and take out from the center of the flour, a sample, and we determined that the flour was free-running, it was good, and we would have that analyzed.

Then you go up underneath the skin of the bag. The skin of the bag is where it has a certain amount of cake, and you go underneath on the skin of the bag, draw your sample from there. You can tell when you hit the cake portion because it is the hard portion. You take your sample from there, analyze that. What we did was take samples from a number of bags and submit it to chemists and have it analyzed, and on their findings, whether they had good or bad flour, was whether we would proceed further to spend the money for reconditioning or not.

Q. In some of this flour such as you have mentioned as damaged by wetness of one kind or another, as I understand it, it may not even be fit for livestock consumption? [267]

A. That is a Government ruling, that it isn't fit for livestock, but the Government doesn't mean

(Testimony of James Gow.)

that it isn't fit for livestock. It can be used for livestock, but the Government doesn't have the force to police it, and some of that flour may get out for human consumption, which they rule against.

Q. Are you familiar with the regulations in Brazil, particularly the Port of Rio de Janeiro, as to reconditioning of flour and whether flour that has been damaged may be sold on the market for either human consumption or livestock consumption?

A. No, I am not.

Mr. Howard: That is all.

Redirect Examination

By Mr. Wakefield:

Q. On this question of 35 per cent which counsel asked about, I would like to be sure that we and counsel and the Court all understand your testimony. The testimony in this case by the surveyor, Mr. Ramos, who testified for the libelant was to the effect that with respect to these 3087 bags of damaged flour, which I have detailed to you in previous hypothetical questions, that he selected six sacks at random which he opened and looked at and measured the depth of penetration of the moisture in the spots, and he [268] said that the maximum was 5 cm. or 1.9 inches, and based upon that examination of six sacks, he has testified that in his opinion the 3087 bags were damaged to the extent of 35 per cent. Now, my first question to you is whether in your opinion it is possible to make any such

(Testimony of James Gow.)

estimate of damage on that kind of examination?

Mr. Howard: Objected to as repetitious, Your Honor.

The Court: It is sustained.

Mr. Wakefield: It may be repetitious, but it is clearing up what counsel got improperly on cross-examination.

He asked Mr. Gow on cross-examination if he meant 35 per cent of the weight of the damaged flour in the bags and that is what I am trying to clear up. I think this is proper redirect examination, Your Honor.

The Court: You may ask him this further question. Afterwards, I think the interrogation of the witness should be suspended here unless there is some specific thing mentioned before. The Court will withdraw the ruling, and the objection is overruled. You may answer this question.

Q. Read the question, please.

(Last question read by reporter.)

A. In my opinion, it is not.

The Court: What else do you think you should inquire on redirect examination, if anything? [269]

Mr. Wakefield: I was going to ask him, in order to illustrate what Mr. Howard asked in cross-examination, what the loss in weight or quantity of flour in the Djambi case was. With respect to bags totally submerged, what percentage of actual flour did you lose?

(Testimony of James Gow.)

The Witness: We lost 5 per cent.

Mr. Howard: That was the subject gone into on direct examination. Counsel had a chance to——

The Court: The objection is sustained. The witness' answer of 5 per cent will be stricken and the Court will disregard it.

Mr. Wakefield: That is all.

Mr. Howard: That is all.

The Court: You may step down.

(Witness excused.)

The Court: Call your next witness.

Mr. Wakefield: I have two more depositions. One is long and one is short.

The Court: Court will be adjourned until tomorrow morning. Those connected with this case are excused until 10:00 o'clock. Court will be adjourned until tomorrow morning at 9:30.

(At 5:45 o'clock p.m., Tuesday, November 1, 1949, proceedings adjourned until 10:00 o'clock a.m., Wednesday, November 2, 1949.) [270]

November 2, 1949

The Court: You may proceed in the case on trial. [271]

* * *

Mr. Wakefield: That is correct, Your Honor. The respondent would next like to call the witness Percy Punnett, a chemist from Pease Laboratories in New York, and read his deposition at this time.

DEPOSITION OF PERCY W. PUNNETT

Direct Examination

“By Mr. Lord:

Q. Will you give us some of your academic attainments, Dr. Punnett?

A. I graduated from the University of Rochester in 1911, receiving the Bachelor of Science Degree in Chemistry, and for four years after that I did graduate work at Columbia University in the Department of Chemistry, particularly in food chemistry, receiving a Master's Degree in 1912 and a doctor's degree—Doctor of Philosophy—in 1915.

Q. These two degrees were at Columbia University?

A. Both at Columbia University.

Q. What is your present profession?

A. At present I am a consulting chemist, or chemical consultant, whichever way you choose to put it, associated with a firm of chemical consultants, the Pease Laboratories [273] at 39 West 38th Street, New York City.

Q. What has your experience as a chemist consisted of?

A. I have had some thirty-four years of experience in various fields of chemistry, including being in charge of control laboratories in various plants, in research work in various products, including several food products, and for nineteen years have been a chemical director of Good House-keeping magazine, doing and supervising the analy-

(Deposition of Percy W. Punnett.)

sis and testing of foods, cosmetics and so on—a wide variety of drugs, some four or five thousand drugs a year. Since 1947 I have been in consulting work, chiefly on food products, things like tea, coffee, bakery products, flours and so on. I am chief chemist of Pease Laboratories and supervising the analysis and testing of all sorts of products, including food, water supplies and so forth.

Q. Will you give us some idea of the number of times that you have made analyses of wheat flour?

A. I have no exact record of the number of samples that I have analyzed, but certainly it would be over fifty and perhaps a hundred such samples.

Q. Have you ever had occasion to make analyses of water?

A. Yes, I have at various times analyzed various types of water, and one of my present duties is to supervise analyses of household waters, industrial waters, waste products of various kinds, from samples coming from private [274] individuals or engineering firms or industrial firms, in connection with this Pease Laboratories, in interpretation of the results and giving of advice to the clients.

Q. What academic or professional societies, if any, have you associated with?

A. I have been a member of the American Chemical Society for over twenty-five years, and am a member of the American Association for the Advancement of Science, and I am a member of certain honorary societies, such as Phi Beta Kappa,

(Deposition of Percy W. Punnett.)

Sigma Xi, an honorary scientific society, and Phi Lambda Epsilon Society, an honorary chemical society.

Q. Are you familiar with a process or method known as the Volhard Process or method?

A. Yes, I am.

Q. Will you explain that process for us, please?

A. The process is one ordinarily used for the quantitative determination of chlorides. It involves the use of a solution or extract of whatever product is being tested which contains the chlorides.

Q. What is the first step in preparing such a product for analysis?

A. The first step, of course, is to obtain a sample—representative sample of the product. The next step is to weigh out a portion of such a sample and to destroy or remove organic material, if present, which it would be in a [275] food product.

Q. What is the method you use to remove these other properties?

A. The weighed sample is usually incinerated or ashed at a controlled temperature, usually not exceeding 450 degrees centigrade. The mineral matter or ash that is obtained is then taken in solution, generally by the addition of a mineral acid—in the case of chloride the acid would be, of course, such an acid as sulphuric or nitric. The solution thus obtained, which may be filtered, of course, to remove any insoluble particles, is then subjected to the Volhard Process for the determination of the amount

(Deposition of Percy W. Punnett.)

of chloride present. This process involves the addition of a measured quantity of silver nitrate in solution, the removal of the precipitated silver chloride by filtration and the determination of the excess silver in the filtrate by the addition of what is known as an indicator material—in this case it is ferric sulphate—and the addition of a sufficient amount of a thiocyanate solution of a known strength. When sufficient has been added, a color change takes place, and by the measurement of the amount of thiocyanate solution added, the amount of silver left in the solution can be calculated, and from that the amount of silver used up in precipitating the chloride originally, and, of course, then the amount of chlorite present in the original sample of the [276] product being analyzed.

Q. Is that residue amount subject to precise determination?

A. The method is quite precise. No chemical method is, of course, absolutely precise, but it is accepted as an excellent and sufficiently precise method for any determination of chloride. The amount of sample that will be used in such a determination will, of course, depend upon the amount of chloride expected in the sample, but the method probably is accurate to one part in .001 of chloride.

Q. Is it customary in making an analysis by the Volhard method to show the percentages of chlorides found as the result thereof?"

Mr. Howard: I object to that question, if it was

(Deposition of Percy W. Punnett.)

customary. The witness has not indicated whether he is familiar with what is customary at the Port of Rio de Janeiro, Brazil, and that is the issue in this case. The shipment arrived at Rio de Janeiro, and that is the point where the custom, if any, would have a bearing on this case, and unless the witness qualifies his answer or his experience to show that he is familiar with that custom, I submit it is inappropriate.

The Court: As I understand it, this deposition was taken upon oral interrogatories propounded to the witness [277] of the time his deposition was taken?

Mr. Wakefield: Yes, Your Honor.

The Court: Was each side represented at the taking?

Mr. Wakefield: Yes, Your Honor.

The Court: The objection is overruled.

"A. Yes.

Q. Doctor, is there a standard method of determining the presence of sodium in wheat flour?

A. Yes.

Q. What is that method?

A. For the demonstration of the presence of sodium, a sample of the flour—which in this case may or may not be accurately weighed—is ashed, following the approximate method I previously described. The ash is dissolved, and a few drops of the ash solution is heated in a flame—Bunsen flame—on a clean platinum wire. The presence of sodium is

(Deposition of Percy W. Punnett.)

unmistakably demonstrated by the appearance of a bright yellow color in the flame. This color can be furthermore identified by the use of a simple hand spectroscope, since the color produces spectro-lights of a definite wave length.

Q. If the spectroscope is not used, would you call the test a qualitative or quantitative analysis? [278]

A. As ordinarily carried out, the flame test for sodium is a qualitative method and qualitative test.

Q. Will you explain for us the difference between a qualitative and quantitative test?

A. The qualitative test, of whatever character, merely determines whether or not an element or a compound is or is not present in the sample under examination. The quantitative test is for the purpose of determining what percentage of that element or compound is present in the sample.

Q. When a quantitative test for sodium has been made, is it customary to state the actual percentage of sodium which is found as the result thereof?"

Mr. Howard: Same objection, without belaboring it, as to the custom.

The Court: The objection is overruled.

"A. Yes, it is.

Q. Are you familiar, or have you heard of a test known as the Barreto method?

A. I have recently looked up the method. Very brief descriptions of the method are published in

(Deposition of Percy W. Punnett.)

two well-known books on chemical analysis, but the descriptions are very brief and somewhat contradictory. I believe that the original method was published in a Brazilian chemical [279] magazine written in Portuguese. This magazine apparently is only available in four or five libraries in the United States, some of which are in Washington, D. C. I have not attempted to obtain copies of the original method. The Barreto method, for the determination of sodium, is not in common use in this country. There are methods that are much more commonly used.

Q. The Barreto method, when used, would be a quantitative analysis, would it not?

A. That, I believe, is the claim of Dr. Barreto in his article. At any rate, the title of the article, I believe, indicates that this is a quantitative method for the determination of sodium, and these abbreviated descriptions that I have read so state.

Q. If the Barreto method were a successful quantitative method, would it or would it not necessarily enable the analyst to determine the percentage of sodium found in the ash?

* * *

A. If the method is a successful and accurate method, I believe that it would enable one to determine the percentage of sodium in the ash of a food product."

Mr. Wakefield: At this point counsel offers a translation of Dr. Barreto's report, such as is

(Deposition of Percy W. Punnett.)

in [280] evidence in this case as Exhibit 4, there is no objection, and it is marked Respondent's Exhibit AA for Identification. That is the same document as Libelant's Exhibit 4 in this case.

The Court: Do you agree, Mr. Howard, to the last statement of Mr. Wakefield?

Mr. Howard: Yes, Your Honor, and New York counsel agreed that under the circumstances the request for copying the exhibit into the record would be withdrawn, as the translation was accepted, and we have a translation now in evidence as Libelant's Exhibit 4.

The Court: The Court is so advised. You may proceed.

“* * *

Q. Doctor, I show you Respondent's Exhibit AA for identification, and ask you if you will examine it.

(Witness does as requested.)

Mr. Lord: For convenience, I should like to refer to Respondent's Exhibit AA for identification as the “Barreto report,” is that satisfactory?

Mr. Prem: That is quite all right.

Q. Have you examined the Barreto report?

A. I have.

Q. Doctor, are you able to form an opinion as to [281] whether or not any of the data shown in the Barreto report justifies the conclusion set forth therein?

(Deposition of Percy W. Punnett.)

Mr. Prem: I object to the question on the ground that what the witness has before him is a conclusion of Dr. Barreto's, and that a more complete basis upon which Dr. Barreto found his conclusion is set out in the testimony of that witness under the commission returned from Rio de Janeiro, and I suggest that the witness be asked to read the testimony of Dr. Barreto in connection with the exhibit he now has before him, as that exhibit is a part of the record of the testimony given by Dr. Barreto in this action. The statement of Dr. Barreto now before the witness is not complete, and I think that the witness should be asked to read that in connection with the testimony heretofore given by Dr. Barreto."

Mr. Howard: Same objection to this question as stated yesterday to similar questions put to other witnesses, without laboring it, that it calls for the opinion of one expert on the opinion of another witness, which I submit is within the province of the trier of the fact.

Mr. Crutcher: May it please the Court, on that question the rule that an opinion of an expert may not [282] be based upon the opinion of an expert means that he may not take as a predicate for his opinion the opinion given by some other expert in the case. There is a lot of material in an annotation in ALR which I have if Your Honor desires it.

The Court: Was there any cross-examination on this point, do you recall?

Mr. Howard: Yes, there was, Your Honor.

(Deposition of Percy W. Punnett.)

Since it was gone into on direct examination and objections were reserved, we obviously had to cross-examine to protect ourselves.

Mr. Crutcher: The issue here is whether from the data set forth, the objective data in the report, the conclusions stated therein are justified. It is not asking for any opinion of Mr. Punnett based upon an opinion expressed by Dr. Barreto. Furthermore, it is not asking for the results of his investigation, it is simply based upon the objective evidence which is before the Court.

The Court: Considering the way this has arisen, and considering the further fact that counsel had an opportunity of cross-examining this witness, I am going to overrule this objection. It is so ordered.

“A. I am. [293]

Q. Are you able to form your opinion with reasonable certainty? A. Yes.

Q. What is your opinion?”

Mr. Howard: Same objection, Your Honor.

The Court: Overruled.

“A. My opinion is that the data in this report is purely qualitative and shows the presence, in the wheat flour mentioned in the report, of substances that are normally present in wheat flour. It does not give any quantitative data as to how much of these substances are present, hence this data is quite inadequate on which to base the conclusion given in the report by Dr. Barreto.

(Deposition of Percy W. Punnett.)

Q. What are the properties or substances in which you would expect to have increases shown as the result of analysis, in the event that there was a salt water mixture with wheat flour?

A. I would expect that the flour wetted by salt water—sea water—would show marked increases in the amount of sodium and of chloride present. In those two elements the change would be most marked. There would be other changes but of minor character.

Q. Have you any opinion, Doctor, as to how pronounced [284] in terms of percentages, such change need be in order to suggest salt water contamination?

A. Yes, I have.

Q. What is your opinion?

A. My opinion is that since sodium and chloride are normally present in wheat flour—the sodium to the extent of .01 percent to .04 percent and the chloride to the extent of .1 to .4 percent—for an analysis to make it certain that the flour had been wetted with sea water, the percentages quoted would have to be more than three times the above figures. This opinion is based upon the amounts of sodium and chloride normally present in sea water, and the normal amounts of the same elements that might be present in other types of water. Sea water contains 1. to 1.2 percent sodium and 1.8 to 2.1 percent chloride. These amounts are considerably greater than the amounts that are found in such a material as fresh water, where the chloride may vary from

(Deposition of Percy W. Punnett.)

.001 percent to .05 percent. The sodium would be somewhat less than these figures.

Q. Is it customary to find some chloride and some sodium in bags containing wheat flour?

A. I would expect to find some small amount in bagging material. Since sodium chloride is an extremely common material that is present in a large number of substances, it may be present in the bagging material. [285]

Q. Doctor, you have testified from an examination of the Barreto report, that in your opinion the conclusion reached by Dr. Barreto is not justified by the data contained in the report. Would your opinion be changed if, in addition to the data shown in the Barreto report, you were advised that Dr. Barreto explained that the word "presence," as used in the report, meant too much chloride and too much sodium?

Mr. Prem: "Too much" in relation to what?"

Mr. Howard: Same objection to this question and the two following questions, through the middle of page 16, as heretofore stated.

The Court: Is the principle any different, Mr. Howard, than that which applied to the preceding objection as to which the Court has announced the ruling?

Mr. Howard: I conceive there would be no difference in principle.

The Court: The objection is overruled.

"A. No, my opinion would not be changed.

(Deposition of Percy W. Punnett.)

Q. Why is that?

A. Because the quantitative data is necessary in order to form an opinion as to whether the flour had been [286] wetted by sea water. Other types of contamination might increase the sodium and chloride present in the flour, and the conclusion as to sea water being the cause of the contamination would rest upon the quantities of sodium and chloride found in the flour alleged to be damaged, in comparison with the amounts of such elements found in the same lot of flour in the portions that had not been damaged.

Q. Would your opinion, as expressed heretofore about the Barreto report, be changed, if, in addition to the data shown in the report and the foregoing explanation by Dr. Barreto as to the meaning of the word "presence" used in the report, you were advised that the Volhard Process was used to determine the presence of chloride, and the flame test and the Barreto method used to determine the presence of sodium?

A. No, my opinion would not be changed.

Q. Is it possible to use the Volhard method or process and the flame test and such a test as the Barreto method qualitatively?

A. Yes, it is.

Q. In such case what would the result of such analyses be?

A. The result would be in this case a qualitative one merely recording the presence or absence

(Deposition of Percy W. Punnett.)

of such elements in the flour but would not give the amounts present. [287]

Q. Dr. Punnett, is there a standard method of sampling bags of wheat flour prior to making analyses thereof?"

Mr. Howard: I object to this question on the ground and for the reason that unless the witness shows knowledge that standard method is recognized in Brazil and followed as a custom in Brazil, the witness is not qualified to answer and his answer would not be competent in the issue involved in this case; and further, that there is no proof of a usage to that effect in the Port of Rio de Janeiro, Brazil.

The Court: The objection is overruled.

"A. Yes, there is.

Q. What is that method?

A. The method which is generally accepted is to take samples from the bags in the following manner: Samples are taken from a number of bags approximately equal to the square root of the total number of bags, with the provision that not less than ten bags be sampled. For instance, if 2500 bags were to be examined, samples would be taken from 50 bags. These samples are to be taken in a specified manner, using a sampling tube—a metal tube—approximately of half an inch internal diameter, and of such a construction [288] that it can be forced through the bag into the flour, and a portion of the flour along the length of the tube

(Deposition of Percy W. Punnett.)

obtained and the tube withdrawn. The standard method requires that the sampling tube be passed in at one of the upper corners of the bag diagonally towards the center of the bag and reaching the center of the bag. After the flour in this tube is removed and emptied into a container, another sample is taken from the other upper corner of the bag in a diagonal direction but reaching only half-way to the center of the bag. These portions of flour that are withdrawn from the bag are then immediately placed in tight containers of such a nature that there can be no loss of moisture from the flour. A separate container is used for each bag sampled. These containers are kept sealed, and before withdrawing a portion for any type of analysis, the contents of the container are mixed thoroughly.

Q. How generally would you say that that sampling method is accepted?

A. That method is accepted by the Association of Official Agricultural Chemists, and is printed in their book which is entitled "Official and Tentative Methods of Analysis of the Association." The same method is accepted by the American Association of Cereal Chemists and printed in their book of methods which is entitled "Cereal Laboratory Methods," published in 1947. The methods endorsed by these two [289] societies are accepted almost universally by chemists who are engaged in food analysis or cereal analysis.

Q. Are you able to form an opinion as to the

(Deposition of Percy W. Punnett.)

reliability, for purposes of analysis, for determination of condition throughout a shipment of approximately 3000 bags, where samples had been taken from six bags?"

Mr. Howard: I object to that question on substantially the same grounds previously stated, asking the witness to form an opinion on the basis of the methods used by another expert, another chemist.

The Court: The objection is overruled.

"A. Yes, I am able to.

Q. What is your opinion?"

Mr. Howard: Same objection.

The Court: Overruled.

"A. My opinion is that the sampling of six bags out of some 3000 would be most inadequate.

Q. In accordance with the standard sampling method that you have just outlined, what would be the proper number of bags to sample from in a shipment of that size? [290]

A. It would be somewhere between 50 and 60 bags.

Q. You testified, Doctor, that the samples are kept in sealed tins or containers. What is the purpose of sealing the containers?

A. One purpose is, as I mentioned, to prevent the loss of moisture in the samples. Another purpose, of course, is to prevent any contamination of the samples while they are in transit or in the laboratory.

Q. Are there any circumstances under which an

(Deposition of Percy W. Punnett.)

analyst might have additional reasons for retaining samples? A. Yes, there are.

Q. What are those circumstances?

A. If there were any question as to the composition of the flour being sampled, or any prospect or expectancy of litigation in the matter, such samples would be preserved very carefully, and sealed possibly even with some sort of a special seal that could be identified. They would also be retained for at least as long as the question remained unsettled. Another purpose for retaining these samples in this manner would be to be able to furnish portions of such samples to other interested parties in the matter, as is customarily done.”

The Court: At this time we will have about a ten-minute recess. [291]

(Recess.)

The Court: You may resume the trial proceedings.

Mr. Wakefield: If the Court please, at this time I would like to hand Your Honor the additional memorandum I spoke of.

The Court: You may do that. Let it be filed.

“Q. Is there any custom in your profession of consulting chemist, relative to records of quantitative analyses?”

Mr. Howard: I object to that question as to the custom in the United States. This man has not testified he is familiar with the custom in Brazil.

The Court: If the answer is admitted to be con-

(Deposition of Percy W. Punnett.)

fined to the United States, the objection would seem to the Court to be tenable and well founded. What is your response, if any?

Mr. Wakefield: If the Court please, I think this is the same question we had up before. This witness and Mr. Williams have both testified that the proper procedures, custom and practice of doing these tests are universal, international.

The Court: Do you show that this is universal by this witness? [292]

Mr. Wakefield: He has so testified.

The Court: I think that if the question does not stand on its own legs—I am not entirely satisfied about this question standing on its own legs in that respect. That is the difficulty I am having with it.

Mr. Howard: I call Your Honor's attention to page 18, where the witness did testify to certain methods being universal, but that applied to sampling methods. We are now on another subject, the records of quantitative analyses, no indication that that is universal.

Mr. Wakefield: Both this witness and Mr. Williams yesterday have testified clearly that these practices are followed by chemists.

The Court: Where did this witness testify that the thing you are now asking about was something that was universal?

Mr. Crutcher: I may enlighten the Court on that. Mr. Williams admitted he had no knowledge,

(Deposition of Percy W. Punnett.)

Your Honor, whether the practice as to records was universal. His knowledge was confined to well-regulated laboratories in the United States, and Your Honor ruled that accordingly he could not testify as to the practice of professional chemists in keeping records and samples.

Mr. Howard: That would seem to be grounds for sustaining the objection, Your Honor.

Mr. Wakefield: If the Court please, my position is simply this: that we are dealing here with a chemist's report in which he has testified—Dr. Barreto, produced by the libelant, has testified—that he used the Volhard method. That is a standard and international method, and this witness has testified about the Volhard method, and that the Volhard method is a quantitative analysis. Both men are talking about the same thing, and this witness is now being asked as to what is the custom in the chemical profession for retaining records on quantitative analyses. That is what we are talking about.

The Court: The objection here, in the way it has arisen, concerning the subject matter here involved, is sustained. Pass on to another subject. I see another subject mentioned in the question near the top of page 21.

Mr. Wakefield: I would like to ask the question at the bottom of page 20.

The Court: You may do that, subject to whatever objection, if any, may be stated.

“Q. What is your practice, as a consulting chem-

(Deposition of Percy W. Punnett.)

ist, with respect to showing percentages in reports of [294] quantitative analyses?"

Mr. Howard: I object to that question, since it appears that this witness has practiced in New York for many years. It is not shown that he is acquainted with the practice in Brazil, and further, on the ground it will appear from the answer his answer is not responsive. He doesn't state what his practice is; he attempts to state a general practice. For all of those reasons, I submit that question and the answer to that question should not be considered by the Court.

The Court: Will counsel inquiring consider the form of the answer and see what you have to say?

Mr. Wakefield: Yes, Your Honor. This is certainly admissible. We are testing the ability of Dr. Barreto and his tests, and here is an outstanding chemist, who is being asked as to what his practice is.

The Court: Note his answer.

Mr. Wakefield: I see his answer. That is what he is testifying to.

The Court: The objection is sustained.

Mr. Wakefield: If the Court please, can't an outstanding chemist of the United States testify to what the general practice is?

The Court: He might possibly on proper [295] interrogation, but the question and answer do not coincide. The objection is sustained, and the ruling concerning it will stand. Pass on to something else.

(Deposition of Percy W. Punnett.)

Mr. Wakefield: Note an exception to the Court's ruling.

The Court: Allowed. [296]

* * *

Q. Dr. Punnett, have you any present plans to go to Seattle, Washington?

A. No, I have not."

Mr. Howard: Before proceeding with the cross-examination, I would like to advise the Court that I will of necessity in view of the Court's ruling as to admissibility and propriety of certain questions on direct examination have to propound certain questions to this witness on cross-examination which develop the same points, but I do so without waiving the objections I have heretofore made to such testimony on direct examination.

The Court: Let the record show that. [300]

"Cross-Examination

By Mr. Prem:

Q. I assume, Doctor, that you have not been afforded the opportunity of reading the testimony of Dr. Barreto given under commission in Rio de Janeiro?

A. Yes, I have had the opportunity.

Q. Then when you testified on direct examination, you knew then that Dr. Barreto was a man of outstanding qualifications as a chemist, both educational and by experience, and also that he had made tests, not only of the damaged portions of this

(Deposition of Percy W. Punnett.)

shipment but also the sound portions, and on the basis of those tests he had arrived at the conclusion that the damaged portions had too much sodium chloride in as distinguished from the sound portions, so that he was in a position to determine whether or not they had been in contact with salt water. Did you know that when you read the testimony?"

Mr. Wakefield: I want to object to that as improper cross-examination in that it states a hypothetical state of facts which is not in accordance with the evidence. Dr. Barreto did not examine the undamaged flour in this shipment, and I invite counsel to point out any place where the testimony so states that he examined any undamaged flour of this same shipment. He said specifically he did not.

Mr. Howard: In the fifth cross-interrogatory to Dr. Barreto, "Did you make a quantitative examination of both the damaged and undamaged flour?" the witness' answer was, "Yes."

Mr. Wakefield: Either there or on cross-examination, he said that he bought some other flour, but not this flour.

The Court: The objection is overruled.

"A. I was not familiar with Dr. Barreto's professional career, except insofar as he made statements in that deposition. I assume that the statements are correct.

Q. Let's assume that they are true: Would you say that he was a chemist of outstanding qualifications?

(Deposition of Percy W. Punnett.)

A. I would say that he was a qualified chemist.

Q. Starting with that assumption, and then having knowledge of the fact that he made these tests—and I invite your attention to the fact that he testified he made tests of four types, one by a flame, another by silver nitrate, a third by the Volhard Process, and a fourth by his own process for sodium contamination—which, as he pointed out, was published in two books, one by Welcher and the other by Mellen—would you not say that because of Dr. Barreto's qualifications as a chemist, he would be in position readily to determine whether the samples that he [302] had taken from the damaged bags which were caked, as you will recall from the testimony, had been in contact with salt water, as distinguished from those samples which he had obtained from the sound bags?

A. My memory of the deposition of Dr. Barreto may be a little at fault—I would like to read the portion where he stated that he had sampled sound bags in this particular lot of flour and analyzed these sound samples, just to refresh my memory.

Q. Answering your inquiry, Doctor, I invite your attention to cross-interrogatory 6, which is this: "If you did make a quantitative examination, please give the comparison of the results obtained between the damaged and undamaged flour.

A. I found that there was more sodium chloride in the damaged than in the undamaged flour." Now, the question is whether or not, based on all that,

(Deposition of Percy W. Punnett.)

his qualifications and the four tests he made, and the fact that he sampled the sound flour and sampled the damaged flour, would he, from that background, be in a position to determine whether the caked flour was damaged by salt water and the other samples uncaked not damaged by salt water?

A. If Dr. Barreto made quantitative analyses indicated by his statement, on portions of the damaged flour and on portions of undamaged flour from the lot of [303] flour in litigation or in question, he should have been able to decide whether or not the damage was due to salt water.

Q. Making tests to determine whether a particular sample of flour has or has not been in contact with salt water is a comparatively easy test for a qualified chemist, isn't that true?

A. That is perfectly true.

Q. Nothing involved or complicated in the matter?

A. Nothing unusual or complicated.

Q. A flame test, silver nitrate test, as well as the Volhard Process, are tests which are commonly practiced by chemists, isn't that true, in relation to ascertaining sodium chloride content of foodstuffs, particularly wheat flour?

A. The flame test and the silver nitrate test are used for the qualitative determination of the presence of the elements included in sodium chloride. The Volhard test and such a determination as the Barreto methods are supposed to be, are quantita-

(Deposition of Percy W. Punnett.)

tive methods for the determination of sodium chloride. We calculate sodium chloride from the amounts of sodium and chloride found.

Q. A flame test will determine whether or not there has been sea water contact with flour, I take it.

A. Only when that flame test is conducted under more [304] definite and elaborate conditions, and when, in making the test, a definite instrument, such as a spectroscope or spectrometer is used to measure the quantity of sodium present. These instruments are very expensive and are not found in every laboratory.

Q. I believe you testified that you were not familiar with the particulars of the process which Dr. Barreto devised with relation to ascertaining the sodium contamination in wheat flour, is that true?

A. That is true.

Q. So that you are not in position now to say just what Dr. Barreto did or did not do in connection with that particular test?

A. I was unable to obtain the exact details of this method, since, as I stated before, the article describing it is not available and the method is not in ordinary common use as are other methods for sodium.

Q. For a chemist to have a particular process devised by him to be published in a text as well known as Welcher's and Mellen's publications, is noteworthy, is it not?

A. I would have to answer that by saying that

(Deposition of Percy W. Punnett.)

sometimes it is. The description of the method in the two books mentioned is extremely brief and apparently copied more or less from an abstract of the original article, this abstract having been printed some time ago in a chemical publication [305] known as "Chemical Abstracts."

Q. Isn't it true that both Wlecher and Mellen are recognized authorities in the field of chemistry?

A. They are recognized as the authors of these two books which are compilations of methods and which do not necessarily contain the experience of the authors with the methods—that is true, of course, of other books of the same general type.

Q. But for a chemist to secure recognition by such well-known authors as I mentioned before, is something that a chemist might well be proud of it?

A. Yes, a chemist could be proud of it.

Q. I notice Dr. Barreto has testified that in addition to being a professor in the Military Technical School in Brazil, that he was also a technical consultant in Brazil of the Monsanto Chemical Company. You, of course, know of that company, do you not? A. Yes, I do.

Q. That is one of the largest and best known companies in the world, I take it? A. It is.

Q. So that you would presume a company of that standing in the chemical field would doubtless search for some chemist of outstanding ability to be its consultant?

A. I assume they would employ consulting chem-

(Deposition of Percy W. Punnett.)

ists of [306] ability in the particular field in which their services were desired. I do not know, of course, in what way Dr. Barreto served the Monsanto Chemical Company.

Q. In answer to the 13th interrogatory, Dr. Barreto testified that qualitative tests were made by the flame method, and that the flame was pure yellow, intensive and high, and that for the quantitative test he used his own test which, as we said before, was published in those two authoritative books, so that, as you have testified, you were not familiar with the quantitative test he made of his own improvisation, other than the Volhard test, you are not in position to comment upon the sufficiency or insufficiency of what he did under those circumstances?

A. That is true, I am not in a position to comment on the precision and accuracy of the method which he devised.

Q. He also, as a quantitative test, employed the Volhard Process? A. Yes.

Q. And as I understand it, that is also a quantitative test?

A. A quantitative test that has been in use for a great many years and has wide and complete acceptance.

Q. In answer to cross-interrogatory No. 10, which is: "What is the basis of your opinion 'that the damage ascertained must be contributed to salt water,' and please [307] explain this in detail,"

(Deposition of Percy W. Punnett.)

Dr. Barreto replied that "I have had long experience in this line and have made hundreds of analyses of wheat flour. I have analyzed fresh water contamination and only a vestige of sodium chloride was present." Now, Doctor, would you say that the analyses of hundreds of samples of wheat flour would enable a chemist of Dr. Barreto's qualifications to readily determine whether a particular sample had been damaged by salt water or whether it was the natural salts in the flour, or had been contaminated by some other element?

A. I would say that the experience in analyzing a considerable number would seem to be a sufficient experience, but that the exact number is comparatively unimportant, in fact a chemist who had analyzed only the flour in question would be able to determine that point of the specific nature of the damage, basing his conclusion upon known analyses of flour and different waters which are available to all chemists.

Q. Referring to your experience in making analyses of samples of wheat flour which had been in contact with fresh water, have you found that that disclosed only a vestige of sodium chloride as a rule?

A. As a rule, when wheat flour has been wetted by fresh water, the increase in the sodium chloride content of the flour is small and is of the order of magnitude of the [308] sodium chloride normally present in wheat flour. This, of course, will vary

(Deposition of Percy W. Punnett.)

depending upon the composition of the fresh water in question and the composition of fresh water varies over quite a considerable range.

Q. In that relation, assume that a sample of flour from the same sack was placed in contact with sea water and a similar analyses was made to ascertain the sodium chloride content of that, that would show a considerable advance in sodium chloride content than that which had been ascertained in relation to the fresh water damage, I take it?

A. I would expect that the increase in the sodium chloride content of the flour would be quite marked.

Q. Let's assume that those two samples of flour—that is the sea water soaked sample and the fresh water soaked sample—were subjected to a silver nitrate test, is it true that that marked difference would also show up upon that test?

A. As I explained before, the silver nitrate test is a qualitative test for the per cent of chloride. It might or it might not show a difference in the two cases which you mentioned, all depending upon other circumstances of the test.

Q. Well, let's assume that the usual silver nitrate test were given to these two samples, what would you expect to find with relation to the two samples—would you say, [309] on the basis of your experience, which had been in contact with sea water and which had been in contact with fresh water?

A. The qualitative test might very well show

(Deposition of Percy W. Punnett.)

that one sample had considerably more chloride in—though giving no quantitative figure—than the other test.

Q. But it would enable you to determine readily that one had been damaged in a different type of water than the other?

A. I would be reluctant to make any statement to that effect, unless I made a quantitative determination of the chloride. That is, the judgment on the relative amounts of the precipitate of silver chloride obtained in such a test is more or less subjective and not as reliable as a quantitative determination which depends upon more objective methods of determining the amount of silver chloride.

Q. Reverting to the flame test: Assuming those two samples were subjected to a flame test, would you expect to find a difference between the fresh water damaged flour and the sea water damaged flour?

A. Again, in a qualitative test, I might believe that I saw a difference in the intensity of the flame, which would be the characteristic that would be evident, but I would be reluctant to make a decided conclusion without making a quantitative determination spectrometrically or by a chemical [310] method of determining the sodium.

Q. Doctor, had you been in Dr. Barreto's position down there in Rio de Janeiro, and you had personally gone to the warehouse where these ship-

(Deposition of Percy W. Punnett.)

ments of 3000 bags were stored, and you saw a great number of bags of caked flour, and you personally took six samples, some of the samples being from the caked flour and some from the uncaked flour, and you made the silver nitrate and flame tests of those two lots of flour, with the knowledge you had gained as the result of having seen the shipment of caked flour and having taken these caked samples, and as I related, having made only the flame and silver nitrate tests, would you be in a position, after those tests, to determine whether or not the caked samples had been in contact with sea water?

A. As I stated before, I would be reluctant to draw a conclusion that the caked samples had been in contact with sea water unless I made a quantitative determination of the sodium and chloride present in comparison with samples of non-caked flour of the same lot.

Q. You have read the testimony of Dr. Barreto, and you have noted that he testified that he made quantitative tests based on the two processes, and that he found that there was more sodium chloride in the damaged than in the undamaged flour. What can you say as to that in relation to whether or not the caked flour had been in contact with [311] sea water?

A. I can only form an opinion, if quantitative figures had been submitted by Dr. Barreto as to the amounts of sodium chloride present. The original report indicates that only qualitative tests

(Deposition of Percy W. Punnett.)

were made. In the subsequent deposition he states he made quantitative determinations. The interpretation of those determinations will depend upon the relation of the quantitative results as expressed in figures, usually in percentage.

Q. Doctor, I invite your attention to an answer given by Dr. Barreto to the 8th cross-interrogatory, and that cross-interrogatory is: "Your report states: 'Chlorides * * * presence' and 'sodium * * * presence.' What percentage does this mean, or can you state the percentage or amount of chlorides and sodium present in the alleged damaged flour." In answer to that cross-interrogatory Dr. Barreto testified "By 'presence' is meant that there is too much chloride and sodium. I can't remember the percentages." You will note from that answer that Dr. Barreto did obtain percentages but that he could not recall at the time this deposition was taken what those percentages were. Does that not indicate to you that he made quantitative tests?

A. It indicates to me that he probably did make quantitative tests, as he states that to be a fact, but I would say that is not submitting the results of such [312] quantitative tests in support of his conclusion, that there was too much sodium chloride present, is not the customary procedure and might even be called unprofessional."

Mr. Howard: I move to strike the last observation of the witness as not responsive to the question.

Mr. Wakefield: I think it is proper, Your Honor.

(Deposition of Percy W. Punnett.)

The Court: The objection is overruled. The trier of the fact will have in mind the witness in New York is talking about something that was done at Rio de Janeiro.

“Q. By “customary procedure,” you are now referring to the customary procedure as it is practiced in the United States, I take it? You, I presume, never practiced the profession of chemistry in Brazil?

A. No, I never practiced the profession of chemist in Brazil, but procedure—customary scientific procedure—would be, I believe, pretty well universal and recognized in most countries where scientific men practice their profession, and that it would be customary to submit exact data in support of any conclusion reached by a witness.

Q. Having in mind Dr. Barreto’s qualifications, and having also in mind the various tests which he made in relation to ascertaining whether or not the caked samples [313] had been in contact with salt water, and having ascertained percentages, although he didn’t recall them, and having formed a conclusion that those caked samples of flour had been in contact with sea water, what would you say as to whether or not reliance could be placed upon Dr. Barreto’s conclusion that the caked samples had been in contact with sea water?

A. I would say that any other chemist or consultant would be unable to decide whether or not Dr. Barreto’s conclusion was justified unless Dr.

(Deposition of Percy W. Punnett.)

Barreto had submitted the actual results of his quantitative determination. I would assume, as a matter of general professional practice and custom, that Dr. Barreto had these figures in a notebook or some other record, and that he could have submitted the figures."

Mr. Howard: I move to strike the last sentence of the answer as an assumption of the witness, a voluntary statement, and not responsive to the question.

The Court: Beginning, "I would assume"?

Mr. Howard: Yes, Your Honor.

Mr. Wakefield: I submit that is just exactly what the cross-examiner has asked him. He asked him about Dr. Barreto's practice, what he thinks of it.

The Court: The request to strike is denied. The [314] objection is overruled.

"Q. Are you aware, Doctor, that this examination which Dr. Barreto was called upon to make, was not made at the request of Health Authorities nor in relation to any similarly related matter, but was made for the purpose of determining the nature of the contamination, so that the question might be determined as to whether or not the loss fell within the coverage of a certain marine insurance policy? Under those circumstances, would you say that there was any requirement to record and preserve percentages of sodium chloride content of the damaged flour?

(Deposition of Percy W. Punnett.)

A. I certainly would feel that in such a case, even though Dr. Barreto was not acting for any governmental bureau or department, it would be essential and good professional conduct to retain the figures and records of his actual determination.

Q. I believe you said you have never practiced the profession of chemistry in Brazil?

A. That is true.

Q. Have you practiced that profession in any other foreign country? A. No.

Q. So your experience as to what is not proper in the [315] field of chemistry, in relation to tests and recording of same, is limited to what is done in the United States?

A. My experience is actually in respect to usage in the United States. However, it is my understanding and belief that scientific usage is almost universal in essential character practically all over the world. I cannot state, of course, whether there is some special custom in Brazil or in some other special country you may happen to mention, but scientists in general have, through years of experience, come to adopt rather universal methods of practice, you might call it.

Q. Doesn't your testimony amount to this, Doctor: That is, that Dr. Barreto is a qualified chemist, that he made a series of tests which are recognized tests to determine the sodium chloride content of flour, that having made those tests he arrived at the conclusion that the caked flour was damaged

(Deposition of Percy W. Punnett.)

by sea water, but that by reason of his lack of percentages of sodium chloride, you are not in a position to check the accuracy of his conclusion—doesn't it amount to that?

A. I am not in a position to check the accuracy of his conclusion without the quantitative figures of his quantitative analysis.

Q. You do not characterize his conclusion on the basis of professional standing or ability nor inadequacy of tests, [316] but merely upon the sole basis that you are unable, on the data furnished by Dr. Barreto, to check the correctness of his conclusion?

A. I am, of course, in no position to comment on Dr. Barreto's professional standing and on his personal qualifications. I am not in a position to comment on the method which he used for the determination of sodium, which is a method which he himself devised, simply because the method is not in common use and is not a commonly accepted method and has not been checked, to the best of my knowledge, by other chemists. It is a common occurrence, in the chemical field, to have a man describe a method for a specific chemical determination. Such methods are usually not accepted as authoritative unless they are checked by other chemists working independently."

The Court: I want you gentlemen to note this as an example of the foolishness of turning a witness loose in a distant place, in a deposition, and

(Deposition of Percy W. Punnett.)

let him go on in a discursive manner. It takes up the Court's time on an occasion when you and I and everybody connected with this case should be getting down to the pertinent facts, instead of listening to pages of this discussion.

Mr. Howard: I move to strike the last portion of his answer as not responsive to the question, beginning [317] with "This is true in respect, for instance."

The Court: I will not strike it, but it is a fault of our procedure more than anything else. I will say to you as a fact trier that it is a useless use of time, but it seems to be engrafted upon our procedure.

"This is true in respect, for instance, to the methods described in the two books on analysis which I mentioned previously—that is the one published by the Association of Official Agricultural Chemists and the American Association of Cereal Chemists. Methods in such books have been checked and re-checked many times before they are published in this form, but many times methods are proposed in literature that afterwards are shown to be inadequate or even inaccurate under certain conditions. I do not know anything about Dr. Barreto's method for sodium other than the very brief and inadequate description in Welcher's and Mellen's, which descriptions were obviously copied from a brief abstract of Dr. Barreto's original article. If I were asked to use Dr. Barreto's method, I would first

(Deposition of Percy W. Punnett.)

of all, of course, obtain the complete details of the method and then I would very carefully determine its accuracy and precision by check methods. In other words, I do not know whether Dr. Barreto's method for sodium is a perfectly reliable method or not. [318]

Q. You will recall that Dr. Barreto used the Volhard Process as well as his own process?

A. Yes.

Q. I take it you have no criticism of the Volhard Process?

A. The Volhard method for the determination of chloride has been checked many times, and if carried out exactly according to the procedure is a reliable method.

Q. My recollection is that some time back in this testimony, you expressed the view that, based on the testimony given in the deposition, Dr. Barreto appeared to be a qualified chemist?

A. I expressed the view, based on his own statements in his deposition. I do not know Dr. Barreto by name and reputation, never heard of him before this matter came up.

Q. Assuming that Dr. Barreto employed the flame and silver nitrate tests, as well as the Volhard method, I take it that your criticism of his conclusion that the caked samples were damaged by sea water is based on the fact that he did not supply percentages to enable you to check his results with

(Deposition of Percy W. Punnett.)

what you think would have to be the sodium chloride content to establish sea water contact?

* * *

A. As I stated before, the silver nitrate and flame tests do not give quantitative figures. My inability to say [319] whether or not Dr. Barreto's conclusion as to the cause of the damage being due to sea water, is based upon the fact that there are no quantitative figures submitted by him as to the amounts of sodium and chloride in the flours in question."

Mr. Howard: I am willing to waive the next question, the last question on page 44, all of page 45, since it relates to the matter of sea algae, which was testified to by Dr. Barreto and which the Court struck from his testimony on motion of respondent. That would take us to the last question on page 46.

"* * *

Q. Doctor, you testified about the mold, bacteria and fungus being a dormant condition in all flour, and that under certain conditions they will develop and cause damage. That does not ordinarily happen in connection with shipments of flour between, say, North and South America, merely from the humidity in the air—in other words, you must have some casualty or contact with water in volume?

A. I could not say from direct experience whether it happens frequently during the passage

(Deposition of Percy W. Punnett.)

from the United States to South America. All I can say is that if the moisture content of the flour rose sufficiently high, and if the [320] temperature were well adequate—because temperature is always a factor in the growth of micro-organisms—and if time were adequate, that such micro-organisms which are present in a dormant state in most flours, would develop to some extent. The source of the moisture is immaterial to the organisms, whether it comes from wetting with fresh water or sea water or whether it is due to the absorption of moisture from the air or any other source of moisture. All the organism wants is enough moisture in order to grow—a decent temperature and a little time.”

Mr. Howard: If the Court please, reverting back to my willingness to waive those questions, I would like to have it understood that I am doing so on the basis of the Court’s ruling on sea algae, and assuming that objections would be made by respondent to such questions.

The Court: Let the record show that.

“Q. If under ordinary atmospheric conditions prevailing on voyages between North and South America, this dormant condition of mold, bacteria and fungus would develop, it would be impractical and uneconomical to make shipments of flour between the two continents, would it not?

A. If under ordinary conditions, I assume it would be [321] very difficult to make such shipments without having the organism proliferate.

(Deposition of Percy W. Punnett.)

Q. So as we have a large volume of trade between North and South America in flour consignments, it would appear that it requires some very heavy saturation to bring about a condition such as was found by Dr. Barreto, isn't that true?

A. I, of course, do not know how often such micro-organisms develop in flour shipped to South America. I assume, as a matter of reason, that it is not too frequently from a financial standpoint, but I can imagine that under some conditions of storage or exposure, the flour might acquire sufficient moisture in some cases to allow the organisms to grow.

Q. You will agree, will you not, that contact with sea water would definitely cause such a condition?

A. Certainly it would, but that is not the only cause.

Q. You testified in relation to the number of samples which ordinarily would be taken from a shipment of 3000 bags?

A. Yes.

Q. And I believe your estimate was something in the neighborhood of 50?

A. 50 to 60.

Q. If you had a shipment of caked bags of flour, why wouldn't one sample of that caked flour be sufficient to [322] disclose whether or not that had been in contact with salt water?

A. If all of the bags of the shipment had been damaged by contact with sea water, it is probable that every sample taken would, on analysis, indi-

(Deposition of Percy W. Punnett.)

cate that fact. However, it is statistically important, in sampling a shipment or a lot of a product, to use such measures and methods that will demonstrate a very high degree of probability that the damage in all cases is due to the cause assigned to it.

Q. It is merely a question of securing further confirmation?

A. It is merely a question of establishing a high degree of probability that the entire damage is due to the cause in question. I might add here that in any determination of the composition of almost any product, whether it is foods or mineral or something else, the sampling is always considered to be a high degree of importance, perhaps of equal importance to the exact analysis, and establishes the reliability of the results obtained by the analysis. I can also add that when a number of samples are taken—an adequate number—that it is customary to analyze each sample individually.”

Mr. Howard: That concludes cross-examination of this witness. [323]

Mr. Wakefield: The redirect does not appear to me to be important, Your Honor. Unless counsel wants it read, I think we can dispense with it.

Mr. Howard: That is agreeable to proctor for libelant, and as proctor for libelant I am also agreeable to waiving the recross-examination.

The Court: This finishes the reading of the deposition. Do you offer this as part of respondent's case in chief?

Mr. Wakefield: Yes, Your Honor.

The Court: This deposition of the witness Percy W. Punnett is received as such.

Mr. Wakefield: The last deposition I have, Your Honor, is a short one of Dr. de Camargo.

DEPOSITION OF BRAZ DE CAMARGO

Direct Examination

“Interrogatory No. 1: Please state your full name, age, residence and nationality.

First—To the First Interrogatory He Says:

Braz Sergio Olivier de Camargo, 38 years, Rua Nascimento da Silva, 182, Rio de Janeiro, Brazil.

Interrogatory No. 2: What is your profession and for how long have you been engaged in your profession?

Second—To the Second Interrogatory He Says:

Attorney at law since graduation in March, 1932.

Interrogatory No. 3: If in answer to the foregoing [324] interrogatory you have stated that you are an attorney at law, please state in some detail the nature and extent of your experience and practice as an attorney at law.

Third—To the Third Interrogatory He Says:

I was a district sheriff of police, State of Sao Paulo, Brazil, then I worked in the Legal Department of the Bank of London in Sao Paulo. I practiced law privately in Sao Paulo and later worked with Richard P. Momsen in Rio de Janeiro for twelve years. I have been privately established in Rio de Janeiro since April 1, 1948.

(Deposition of Braz de Camargo.)

Interrogatory No. 4: Within your experience and practice, have you had occasions to deal with various laws and regulations of Brazil relating to Customs and the Custom House.

Fourth—To the Fourth Interrogatory He Says:

Yes.

Interrogatory No. 5: Do you in your professional experience have knowledge of the Customs laws and regulations of Brazil now in force, and those laws in force in February of 1946?

Fifth—To the Fifth Interrogatory He Says:

Yes.

Interrogatory No. 6: Are you acquainted with the various Custom House regulations in force in February of 1946?

Sixth—To the Sixth Interrogatory He Says:

Yes.

Interrogatory No. 7: Please state whether the following regulation, being Article 279 of Custom House Regulations, is to your knowledge and within your experience a regulation which was in full force and effect in Rio de Janeiro in February, 1946:

“Article 379. The longshoreman foreman, his assistants, warehouse keepers, and guards attending discharge and in charge of organizing records are responsible for pointing out all packages turning up damaged, broken, re-nailed, or in any way damaged, this circumstance also to be noted on discharge sheets,

(Deposition of Braz de Camargo.)

the necessary declarations being noted down on the same day as packages are discharged. (Decree n. 355 A of 25th April, 1890, Art 11.)”

Seventh—To the Seventh Interrogatory He Says:

Yes. It is a provision of the Nova Consolidacao das Leis das Alfandegas e Mesas de Renda which I think is dated 1890.

Interrogatory No. 8: If the foregoing regulation (Article 379) is not a correct statement of the regulation of the Custom House in effect in February, 1946, please set forth in full the regulation which was then in effect pertaining to the requirement for noting damage in Custom House records on all cargo discharged from vessels at Rio de Janeiro.

Eighth—To the Eighth Interrogatory He Says:

It appears to me to be a correct statement.

Interrogatory No. 9: Please set forth the text of Article 463 of the Custom House regulations, and state whether [326] said article was in full force and effect in February, 1946.

Ninth—To the Ninth Interrogatory He Says:

In view of the numerous articles of the Consolidacao it is practically impossible to know them by heart.

Interrogatory No. 10: Please set forth the text of any other law or regulation dealing with the receipt, notation or recording of damaged cargo discharged from vessels at Rio de Janeiro which was in effect in February, 1946.

Tenth—To the Tenth Interrogatory He Says:

(Deposition of Braz de Camargo.)

There are several regulations and provisions dealing with the discharge of cargo at the several individual ports of Brazil issued by the respective port administrations, but none can conflict with the rules set forth in the Nova Consolidacao which rules the notation and recording of damaged cargo discharged for customs house duties exemptions. The Nova Consolidacao rules for all of Brazil and for customs house duty purposes the notation for damaged cargo discharged at all ports.

Interrogatory No. 11: Based upon the laws and regulations of Brazil as noted above and your experience in your profession, please state whether or not the Brazilian Customs officials or employees are required to and do inspect all cargo discharged from ships at Rio de Janeiro, and make notation of any damage to cargo in the Custom House records." [327]

Mr. Howard: Libelant objects to that interrogatory as it has not yet been made to appear that this witness has any actual knowledge over and beyond his experience based on his acquaintance with Brazilian laws and custom regulations.

The Court: Is the question conditioned upon this witness' knowledge? Is it "if he knows"?

Mr. Wakefield: Yes. "Based upon the laws and regulations of Brazil as noted above and your experience in your profession, please state whether or not * * *"

Mr. Howard: Then it proceeds to ask him whether they do inspect.

(Deposition of Braz de Camargo.)

The Court: The objection is overruled.

“Eleventh—To the Eleventh Interrogatory He Says:

The Brazilian customs house officials are required to inspect all cargo discharged and make notation of any damage. The consignees generally insist on such notations since it is on said notations that the custom house duties are assessed.

Interrogatory No. 12: In your opinion, please state whether in the case of bags of flour discharged from a vessel at Rio de Janeiro in February, 1946, which flour was at the time of discharge damaged by contact with salt water and resulting in staining and caking of the bags, this condition is required to be and as a matter of actual practice would [328] be noted and stated in the Custom House records.”

Mr. Howard: Same objection, and further, this question is not qualified as being based upon his knowledge of laws and regulations and experience in his profession. He is asked to state as a matter of actual practice whether a certain thing is done, and it was not shown that he was present or had any personal knowledge on the occasion referred to in February, 1946.

The Court: I understand that the question, as in the preceding question, essentially calls for his knowledge of the laws and customs of Brazil touching the issues involved in this inquiry. I think it is reasonable to so understand the questions, and the objection is overruled.

(Deposition of Braz de Camargo.)

“Twelfth—To the Twelfth Interrogatory He Says:

In my opinion, this condition would have been noted by customs house officials and even if his attention had not been drawn to such bags in the condition as described in Question No. 12, the representative of the consignee at the time of discharge would probably have called the attention of the official to it. It is doubtful that the official would not have noted the condition of the bags to avoid future doubts with reference to the duties.”

The Court: The Court has in mind the weight and effect of the answer as being that which should be attributed to comment and possibly some argument.

“Cross-Interrogatory No. 1: Were you, in February and March, 1946, acquainted with, or did you then have knowledge of, a shipment of flour discharged from the S. S. ‘Sweepstakes’ at Rio de Janeiro on or about February 20, 1946, and consigned to Companhia Luz Stearica?

First—To the First Cross-Interrogatory He says:
No.

* * *

Cross-Interrogatory No. 3: Is your answer to direct interrogatory No. 11 based on actual knowledge of the inspection of all cargos discharged from ships at Rio de Janeiro and actual knowledge of notation of any damage to such cargos in the Customs House record on each and every shipment?

(Deposition of Braz de Camargo.)

Third—To the Third Cross-Interrogatory He Says:

Yes, because as attorney I have had to present pleas for captains of ships which discharged merchandise short, said captains being then held responsible for customs house duties on merchandise not discharged.

* * *

Cross-Interrogatory No. 5: Is it not a fact that the inspection of cargo and notation of any damage to such [330] cargo referred to in interrogatory No. 11 is usually accomplished when such cargo passes through the Brazilian Customs Warehouse at the port of Rio de Janeiro?

Fifth—To the Fifth Cross-Interrogatory He Says:

No. The inspection of cargo is made at discharge from vessel. Further inspection is later on made for certain goods, such as machinery, autos, etc., for tax purposes and proper classification under the tariff when goods pass through the customs warehouse.

Cross-Interrogatory No. 6: Is it not a fact that the inspection of cargo and notation of any damage to such cargo by Brazilian customs officials or employees may be waived or omitted, where by special arrangement the consignee has paid the duty prior to discharge and has secured permission for discharge directly from ship to rail cars for immediate shipment to private warehouse of consignee, without passing through Brazilian Customs Warehouse?

(Deposition of Braz de Camargo.)

Sixth—To the Sixth Cross-Interrogatory He Says:

They (the customs officials) generally inspect the cargo. If this was not done for certain cargoes, for which permission by special arrangement has been obtained, the officials would not be able to check that the duties have been properly paid.

Cross-Interrogatory No. 7: If it is assumed that the particular shipment of flour involved in this litigation was by special arrangement with customs officials discharged [331] directly from the ship to rail cars for conveyance to private warehouse of the consignee, without passing through Brazilian Customs Warehouse, is it not possible that Brazilian customs officials did not inspect all of such cargo upon discharge or make notation of any damage to such cargo in the Custom House record?

Seventh—To the Seventh Cross-Interrogatory He Says:

It may be possible but it is very doubtful, since customs officials have a percentage of the fines imposed on the parties who do not declare exactly the nature of the cargo. It would be in the interest of the official to check any cargo, and, if shortlanded, fine the captain of the ship.

Cross-Interrogatory No. 8: Is your answer to direct interrogatory No. 12 based on actual knowledge of the method of handling the specific shipment of flour consigned to Campanhia Luz Stearica involved in this litigation, or is your opinion based on your knowledge of the text of Brazilian laws and regulations, or otherwise?

(Deposition of Braz de Camargo.)

Eighth—To the Eighth Cross-Interrogatory He Says:

My opinion is based on my knowledge of Brazilian law and my experience as an attorney.

Cross-Interrogatory No. 9: State what if any personal knowledge you have as to whether the shipment of flour consigned to Companhia Luz Stearica and discharged from the S.S. "Sweepstakes" on or about February 20, 1946, did actually pass through customs warehouse and inspection at Rio de Janeiro after discharge.

Ninth—To the Ninth Cross-Interrogatory He Says: None.

Cross-Interrogatory No. 10: Is your answer to the preceding interrogatory based on personal observation of the shipment of flour in question after discharge from the S.S. "Sweepstakes"?

Tenth—To the Tenth Cross-Interrogatory He Says: No.

Cross-Interrogatory No. 11: When and in what manner and by whom was the matter of your giving this deposition first brought to your attention?

Eleventh—To the Eleventh Cross-Interrogatory He Says:

By Mr. Botelho, about one or two weeks ago, by telephone. I told him I was too busy at the time and that as soon as I could go, I would give my deposition.

Cross-Interrogatory No. 12: With whom and when did you first discuss the matters you have

(Deposition of Braz de Camargo.)

testified to in this deposition, either verbally or by correspondence? Please explain in detail.

Twelfth—To the Twelfth Cross-Interrogatory He Says:

With Mr. Botelho, at the time he called. I was rather busy at the time and a little annoyed that my name had been given. [333]

Cross-Interrogatory No. 13: Are you regularly engaged, or do you serve as correspondent attorney for the Moore-McCormack Lines at Rio de Janeiro or other Brazilian ports, in connection with cargo damage claims?

Thirteenth—To the Thirteenth Cross-Interrogatory He Says:

At the moment and since April 1, 1948, I am not engaged as an attorney for Moore-McCormack Lines in connection with cargo damage claims."

The Court: Does respondent offer this deposition as part of respondent's case in chief?

Mr. Wakefield: Yes, Your Honor.

The Court: It is received as such.

Mr. Wakefield: That concludes the respondent's case. Respondent rests.

The Court: Is there any rebuttal?

Mr. Howard: I have one witness in person on rebuttal, Your Honor.

The Court: You may call him.

FRANCIS P. OWENS

called as a witness by and on behalf of libelant, having been first duly sworn, was examined and testified as follows: [334]

Direct Examination

By Mr. Howard:

Q. Will you state your full name and residence address?

A. Francis P. Owens, 2739 38th Avenue S.W.

Q. What is your business or occupation?

A. I am a chemist.

Q. Where are you employed?

A. With Laucks Laboratories, Inc.

Q. For how long?

A. I have been with them for going on 16 years.

Q. What duties do you perform? What is your position with Laucks Laboratories?

A. I am secretary-treasurer of the company, and my duties consist of directing the work that is done in the laboratory itself, the analytical work.

Q. What schools or colleges are you a graduate of, and when?

A. I was graduated from Washington State College at Pullman with a degree of Bachelor of Science in Chemistry, in June, 1933.

Q. Did you take any graduate courses?

A. I took some graduate work at the University of Washington in 1940.

Q. In what subjects?

(Testimony of Francis P. Owens.)

A. Bacteriology. [335]

Q. Are you a member of any professional societies or organizations? A. Yes, sir.

Q. What, please?

A. I belong to the American Chemical Society and the American Institute of Chemists, and the American Association of Cereal Chemists.

Q. Are you a member of the Institute of Food Technologists? A. Yes, sir, I am.

Q. Are you an officer in any capacity of the American Association of Cereal Chemists?

A. At the present time, I am president of the Pacific Northwest section.

Q. In your duties as a chemist and since you have been engaged in those duties, have you ever had any occasion to analyze samples of flour or cereal or grain products for any particular purpose? A. Yes, sir, I have.

Q. How frequently have you been called upon to do that?

A. We average, I would say, a minimum of one sample a week.

Q. What is the purpose of those tests or analyses that you make?

A. Well, the purpose is usually to determine the quality [336] of the product and to establish its values as a food product.

Q. Have you ever tested samples of grain or cereal products for salt water contamination?

A. Yes, sir, I have.

(Testimony of Francis P. Owens.)

Q. Are the tests that you would use for that the same as would be used for testing flour samples for similar contamination?

A. The general procedures are the same.

Q. How frequently have you been called upon to conduct such tests?

A. Well, it has been innumerable times. I have never tabulated or attempted to tabulate the number of times I have, but it has been very often.

Q. Have you read the report, the translation of the report of Dr. Barreto, a chemist at Rio de Janeiro, in connection with this shipment of flour of 10,500 bags?

The Court: Let the record show that report is in evidence as Libellant's Exhibit 4.

A. Yes, sir, I have.

Q. Have you also read the deposition of Dr. Barreto, the questions and answers that were sent to and answered by him?

A. I have.

Q. Have you also read the deposition of Dr. Punnett, a witness who testified in New York, a chemist from Pease [337] Laboratories?

A. I have.

Q. Incidentally, a Mr. Thomas Williams testified yesterday that the chloride content of ash of wheat flour ranged from .1 per cent to 0 per cent, and he cited as an authority for that a text by John Wiley on chemistry, on chemical procedures, Vol. 1, p. 238. Do you agree with that statement?

Mr. Wakefield: Just a minute. I object to the

(Testimony of Francis P. Owens.)

question, if the Court please, as not proper rebuttal. This witness, I take it, is called to impeach an impeaching witness. Mr. Williams was called by us to impeach Dr. Barreto, and this witness is now called to impeach Mr. Williams. I think Your Honor knows impeaching an impeaching witness is beyond the scope of testimony permitted on rebuttal, because we could go on indefinitely if we could impeach each impeaching witness. The rule is that you can't call a rebuttal witness to impeach an impeaching witness. I submit this is not proper rebuttal in any sense of the word.

The Court: The objection is sustained, so far as the Court's opinion upon the asserted situation is concerned. The Court is more specific, however, in sustaining the objection relating to the form of this question. I can conceive of the possibility of asking [338] the witness a proper form of question, but at least as to what has been asked, the objection is sustained.

Q. Can you state what the chloride content of ash of wheat flour would be?

Mr. Wakefield: I object to that as not proper rebuttal. That is a part of libelant's case in chief, to prove what the standard content would be.

The Court: I will hear counsel's response.

Mr. Howard: Your Honor, that was not put in issue in this case until respondent's case, when he brought in the testimony of Dr. Punnett as to one statement as to percentage of chloride content of

(Testimony of Francis P. Owens.)

ash of wheat flour, and then he brought in the witness Mr. Williams, who testified otherwise.

I am trying to develop from this witness what the content is, and it was not developed on libelant's case in chief. It was raised after respondent put in an expert witness, and respondent examined the expert witness on that. I submit it is proper rebuttal under those circumstances.

Mr. Wakefield: Dr. Barreto testified to this in his deposition. The content of this chemical in the ash is one of the things that—in normal uncontaminated flour is one of the things Dr. Barreto was asked.

Mr. Howard: Your Honor, in order to facilitate this, [339] I will withdraw the question.

Q. What tests are usually made on samples of cereal flour products to determine whether there has been salt water contamination, in your experience?

Mr. Wakefield: That is objected to as not proper rebuttal, part of the libelant's case in chief.

Mr. Howard: The issue in this case as it is now resolved, by reason of respondent's witnesses who have been called for the sufficiency of tests made by Dr. Barreto—we considered calling this witness on direct and had him available for many months to call him on direct, but after careful consideration it was concluded his testimony would be more proper as rebuttal evidence after the evidence had been put in by respondent, and the questions which

(Testimony of Francis P. Owens.)

I propose to put to him have been very carefully prepared as rebuttal questions and not as part of libelant's case in chief, the questions directed as to the issues raised by respondent's witnesses who testified by deposition and in person.

Mr. Wakefield: I submit that "what tests are used" isn't to rebut anything. We are embarking on new testimony as to what proper tests are.

The Court: The objection is overruled. Read the question.

(Last question read by reporter.) [340]

A. In our experience, the usual tests that are made are for the presence of chlorides, sodium, calcium, sulphates and magnesium.

Q. What tests would be used for sodium?

A. There are two tests which we employ. We employ what is commonly referred to as the flame test.

The Court: Leave out what you especially do. Just answer the question directly, if you know the answer.

The Witness: The flame test and the spectrographic test.

Q. What test would be used for chlorides?

A. The Volhard test.

Mr. Wakefield: I submit this isn't rebutting anything. It is just a repetition of the same thing we have had from these other witnesses.

The Court: I ask counsel examining to consider

(Testimony of Francis P. Owens.)

carefully what aspects of the witness' Punnett's expert testimony, if any, were not gone into on libelant's case in chief; and if there are any such instances, if you care to direct this witness' attention to those instances, ask him supposititious questions and get his opinion upon them without giving him an opportunity to expressly dispute the validity of the witness Punnett's answers.

Mr. Howard: Your Honor, over my objection the respondent was allowed to interrogate his witnesses as [341] to the validity and reliability of the findings and conclusion of Dr. Barreto, the chemist who testified on our direct case. That is the testimony that I am particularly referring to in respondent's case, where over objection the Court permitted such testimony to be given by those witnesses.

The Court: This question seeks to reach what?

Mr. Howard: Preliminary to my questions which will correspond to the questions which respondent was allowed to interrogate his witnesses.

The Court: I do not wish to cut counsel off if you have not covered it, but the Court is ready to rule.

Mr. Wakefield: It is my position, Your Honor, that you cannot as a matter of law of evidence call a witness to impeach an impeaching witness, and that is all he is doing here. He is calling this man to impeach either Dr. Punnett or Mr. Williams, who in turn had been called to impeach Dr.

(Testimony of Francis P. Owens.)

Barreto, and therefore it isn't proper rebuttal for that reason, and it isn't proper rebuttal for the further reason that it isn't rebutting anything that the respondent testified to.

The Court: I am not convinced that the libelant was required to anticipate respondent would attack the methods used by Dr. Barreto. It seems to me that the effect of the witness Punnett was to attack the [342] sufficiency and validity of the methods. As applied to what is now occurring, the Court overrules the objection.

Mr. Howard: Just one more statement, very briefly. Libelant could not very well put on this testimony on its case in chief until the testimony had come in of Dr. Punnett and Mr. Williams, which is the testimony we seek to defend against.

The Court: The Court overrules the objection.

Q. In making tests for sodium and chloride, particularly chloride, can the Volhard process be used qualitatively? A. Yes, sir.

Mr. Wakefield: I object to that. There is no issue on that. Everybody agrees that the Volhard test can be used qualitatively, but it isn't conclusive.

The Court: The answer is made and will stand.

Q. What chemical properties or constituents would be found in markedly increasing quantities or amounts in samples of wheat flour which had been contaminated by salt water?

A. Chlorides, sodium, calcium, magnesium and sulphates.

(Testimony of Francis P. Owens.)

Mr. Wakefield: Was that in flour which had not been contained?

Mr. Howard: Samples of wheat flour which had been contaminated by salt water.

Mr. Wakefield: I thought you said "had not been."

Q. Did you understand my question to be which had been [343] contaminated by salt water?

A. Yes, sir.

Q. How would you determine in samples or analyses of wheat flour whether the chloride content was attributable to salt water rather than some other form of chloride contamination?

Mr. Wakefield: I object to that again. If this man is called to support Dr. Barreto, which obviously could be the only justifiable purpose, I submit he should be asked questions which incorporate what Dr. Barreto did, rather than to give us his own testimony as to how you find chlorides. That isn't rebuttal at all.

The Court: Do you expect to connect his answer up with an attitude that is harmonious or in agreement with what Dr. Barreto did?

Mr. Howard: Yes, Your Honor, and respondent's witnesses were allowed to answer the same questions.

The Court: The objection is overruled. Do you have the question in mind? Read the question.

(Last question read by reporter.)

(Testimony of Francis P. Owens.)

The Witness: That is usually confirmed by the presence of significant quantities of calcium, magnesium and sodium and sulphates.

Q. Would these last four elements that you mentioned be found in other chlorides, such as table salt? [344]

A. No, sir, not in table salt.

The Court: Court is recessed until 1:30.

(At 12:05 o'clock p.m., Wednesday, November 2, 1949, proceedings recessed until 1:30 o'clock p.m., Wednesday, November 2, 1949.)

Seattle, Washington, November 2, 1949, 1:45 o'clock p.m.

Q. Mr. Owens, does the Barreto report, Libellant's Exhibit 4, indicate that a test was made for the presence of calcium and magnesium, as well as sodium and chloride? A. Yes, sir.

Q. Does the amount of sodium and chlorides vary greatly in different grades and qualities of wheat flour?

Mr. Wakefield: I want to object again to the question as not being proper rebuttal. I have here a statement which I think covers the situation, 53 Am. Jur., Sec. 121, Evidence in Chief on Rebuttal. "As a general rule, the party upon whom the affirmative of an issue devolves is bound to give all his evidence in support of the issue in the first instance, and will not be permitted to hold back part of his evidence confirmatory [345] of his case and

(Testimony of Francis P. Owens.)

then offer it on rebuttal. Rebuttal testimony offered by the plaintiff should rebut the testimony brought out by the defendant and should consist of nothing which could have been offered in chief."

All he is doing here is trying to bolster Dr. Barreto's report, or explain it, and if that report needed bolstering or explaining, it was part of his case in chief to do so.

Mr. Howard: Your Honor, I would like to read from the same text, the preceding section, entitled, "Sec. 120. Rebuttal." In the middle of that section, "What is rebuttal evidence rests largely within the discretion of the trial court. However, rebuttal evidence may as a general rule pursue the same scope as that developed by the evidence in chief given against the party offering the rebuttal evidence, even though such evidence may have been inadmissible in chief over the objection of the adversary."

The Court: Will you pass that book to me? I want to see it.

I have the same view, gentlemen—I have considered both of these statements mentioned by counsel in their statements in connection with this objection—that I am not convinced that the libelant was bound to anticipate in connection with libelant's case in chief that the [346] respondent would through the testimony of the witness Punnett or otherwise question the validity of the tests made by the libelant's witness Dr. Barreto. Therefore, this objection is overruled.

(Testimony of Francis P. Owens.)

Mr. Wakefield: Just so that we will not have to make interruptions, Your Honor, may I suggest this: That my objection, in view of Your Honor's ruling, will go to all the evidence other than the actual testimony of the witness about the Barreto report. I think if he is asked about Dr. Barreto's report, then it is possibly proper under Your Honor's ruling, but to go through the whole field of chemical analysis with respect to——

The Court: I think it might be helpful if counsel for libelant could indicate the scope of this inquiry, in view of the last statement by Mr. Wakefield.

Mr. Howard: After showing what this witness—the familiarity of this witness with the chemical tests and procedures and the nature of the tests that were made by Dr. Barreto, I intend to develop from this witness that he has made similar tests for comparative purposes, and ask the witness to testify as to what those tests indicate as to whether it is reliable for the determination of salt water contamination. Essentially, that is what the balance of the examination of this witness will consist of.

Mr. Wakefield: May I suggest in that connection that that is the very type of testimony which is improper. He proposes to have this witness show what kind of a test should be made and what the results are.

This deposition of Dr. Punnett, to which Your Honor referred, was taken in April, 1949, five or

(Testimony of Francis P. Owens.)

six months ago. Counsel has had a copy of that deposition for that length of time, and I submit that if this witness wants to discuss the Barreto report as to its accuracy or what not, that is within the scope of Your Honor's ruling, but to have independent testimony as to what he did and what he found is part of the case in chief.

Mr. Howard: Respondent's witnesses were allowed to testify as to what they had done as a matter of custom and practice and general practice on these tests, and whether they considered them sufficient or not. We say that is the first time we had any issue to meet.

The Court: How long do you think it will take to do this?

Mr. Howard: Fifteen minutes, without interruption.

The Court: You may have fifteen minutes from now on direct examination of this witness on those lines.

Q. What amount, if any, of sodium chloride would be found in samples of flour contaminated by fresh water?

A. A very negligible amount. [348]

Q. Have you recently made comparative tests on samples of flour contaminated by fresh and salt water? A. Yes, sir.

Q. Will you describe the test you made, please?

A. Samples of flour were tested as received for their chloride content and their sodium content, tests

(Testimony of Francis P. Owens.)

were performed by the sodium flame procedure and by the Volhard procedure and by spectrographic procedure. Samples of fresh water and salt water were tested in the same manner. Samples of the flour then had added to them definite quantities and equivalent quantities of fresh water and salt water and were run through the same test for the purpose of determining whether or not there was a significant difference between flour wetted with salt water and flour wetted with fresh water. That in general was the scope of the test.

Q. What was the result of your test, the silver nitrate Volhard process, as to the difference in the presence of sodium and chloride in fresh water contaminated samples of flour and salt water contaminated samples of flour?

Mr. Wakefield: May it be understood my objection goes to all those questions?

Mr. Howard: No objection.

The Court: It is so understood and approved by the Court.

A. There was a very definite difference in the results. [349]

Q. Can you state that in terms of how many times more or less of the chlorides were found in one sample than the other?

A. With the samples employed, there were approximately 78 times, I believe it was, as much difference between the sample wetted with salt water as compared with the sample wetted with fresh water.

(Testimony of Francis P. Owens.)

Q. 78 more times? A. Yes, sir.

Q. What was the result insofar as the sodium flame test was concerned?

(Photograph marked Libellant's Exhibit 5 for Identification.)

Q. Did you understand the question?

A. Yes, sir. On the sodium flame test with flour itself, the test was insignificant in that there was merely a slight indication of the presence of sodium, while with flour wetted with fresh water, the results were relatively the same, and flour wetted with salt water, there was a very positive evidence of sodium.

Q. Did you then make some spectrographic tests of that sodium content?

A. Yes, sir. The flours as treated were then subjected to spectrographic analysis, and spectrographic analysis being capable of being recorded so that the results can be [350] observed visually, further demonstrated the fact that sodium in flour wetted with salt water is much more prevalent than in flour wetter with fresh water.

Q. Handing you what has been marked for identification as Libellant's Exhibit 5, can you state what that is?

A. Yes, sir. This is a photograph of the film that was gotten in our spectrographic analysis, in the testing of these samples for the sodium content.

Q. Does the film represent two different wave lengths for sodium? A. Yes, sir.

(Testimony of Francis P. Owens.)

Q. Will you point out to the Court and counsel the sample that represents flour contaminated with fresh water on the film?

Mr. Wakefield: If the Court please, I hate to interrupt again, but I must because this is objectionable on another ground. This certainly is new direct evidence of tests made by this man where he is purporting to produce his results without any showing that the conditions were in any respect the same as in our case, how much salt water, what density of salt water, what kind of flour, where did it come from.

He speaks of the spectrograph being used. There is no evidence in this case that Dr. Barreto or any of the persons who examined the damaged flour in this case [351] used a spectrograph. This is purely speculative, highly prejudicial to the issues in this case, to take a test run by a man which is not relevant to the facts here. That was the basis of counsel's objections to many of my questions this morning. I submit it is incompetent and highly improper rebuttal.

Mr. Howard: This witness has testified that the amount of sodium chloride does not vary greatly in different grades and qualities of wheat flour, and I submit with the evidence in the record that Dr. Barreto made both qualitative and quantitative tests, that this evidence is certainly in point to determine the comparative results, and to corroborate the evidence that was given by the witness and which is contradicted on respondent's case.

(Testimony of Francis P. Owens.)

The Court: The objection to this exhibit is sustained. You can ask him within the scope of the Court's previous allowance. Ask him to state oral answers to oral questions, but the objection to this exhibit is sustained.

Mr. Howard: I offer this exhibit in evidence at this time, Your Honor.

Mr. Wakefield: It is objected to.

The Court: Sustained. It is without prejudice to your asking oral questions and obtaining oral answers [352] in the scope that has previously been mentioned.

Q. State whether or not it is true that flour wetted with fresh water would contain about the same amount of sodium chloride as present in good wheat flour? A. It would.

Q. Do you consider that it is necessary to make a quantitative rather than a qualitative analysis of wheat flour to determine whether the contamination is by fresh or salt water? A. I do not.

Q. Why not?

A. The presence of sodium in any significant quantity or chlorine in any significant quantity, when calcium, magnesium and sulphates are likewise present—the presence of sodium and chlorine, when accompanied by the presence of calcium and magnesium and sulphates in significant quantities definitely demonstrates that the contamination is from an extraneous source and is not indicative of fresh water, but rather indicative of salt water.

Q. Do you consider laboratory testing of flour

(Testimony of Francis P. Owens.)

samples qualitatively by the Volhard silver nitrate test for chlorides and the flame test for sodium as reliable on the question of whether there has been salt water contamination?

A. I feel that they are.

Q. Did the tests made by you on other samples of flour [353] by the procedures which we have just mentioned confirm or contradict the findings and conclusions of Dr. Barreto as you have read them in his report and in his deposition?

A. They confirmed his findings.

Q. In your opinion, based on your experience, would Dr. Barreto have obtained the same results if samples wetted by fresh water had been tested?

A. No.

Mr. Howard: I have no further questions.

Cross-Examination

By Mr. Wakefield:

Q. In attempting to determine the presence of sea water, do you look for any certain quantity of sodium chloride in a commodity?

A. It depends upon the commodity that is being tested.

Q. Flour?

A. No, I don't feel it is necessary to determine the quantity when wheat flour is being tested.

Q. Where is the breaking point between the maximum normal quantity possible and that which has been contaminated by salt water?

A. In flour that had nothing in it at all, you

(Testimony of Francis P. Owens.)

mean? Well, with respect to sodium, the sodium content of flour is negligible. By that I mean maybe from one-hundredth of [354] a per cent to none at all, and with respect to chlorine, it varies between a trace to one-hundredth of a per cent for chlorine itself.

Q. So it is possible in undamaged natural flour, in some instances, to find both sodium and chlorine, is that correct?

A. In insignificant quantities.

The Court: That is undamaged by sea water, do you mean in your question?

Mr. Wakefield: Yes, sound flour.

Q. If you come up with a finding that it is sea water and you haven't used a quantitative test at all, how do you do that, by looking at the flame?

A. That's right. With the flame test and with the silver nitrate test, you can tell by the results of the test itself whether it is an insignificant quantity or if there is enough there to amount to something and indicate a result.

Q. But in your chemical work, isn't the constituency of sea water, that is, the sodium chloride in sea water, of a definite percentage?

A. It is relatively stable as far as the salts content is concerned throughout the world, yes.

Q. Do you think you could tell that necessary percentage merely by looking at the flame?

A. I don't say I could tell a percentage, but I do say [355] I could tell whether or not it was fresh water or salt water that caused the contamina-

(Testimony of Francis P. Owens.)

tion, by the difference in density of the test.

Q. Are you including in your calculations the possibility of other sources of contamination of sodium chloride?

A. I am basing my opinion on the presence of the accompanying sulphates, magnesium and calcium.

Q. In other words, the traces of magnesium and calcium indicate what?

A. They further substantiate the likelihood that it is salt water.

Q. Do you mean to testify that there is no calcium or magnesium in sound flour?

A. No, I do not.

Q. There is calcium and magnesium in sound flour?

A. There is, but it isn't in the water soluble form.

Q. In your business, if you were asked to give an opinion with respect to contamination of flour as to its cause or source of contamination, would you feel justified in giving an opinion that it was sea water without making a quantitative analysis?

A. If the——

Q. Not "if," just would you?

Mr. Howard: I think the witness should be allowed [356] to answer before counsel interrupts him.

Mr. Wakefield: I think he can answer that yes or no.

The Court: I think so.

(Testimony of Francis P. Owens.)

The Witness: May I hear the question again?

(Last question read by reporter.)

The Witness: I would.

Q. In Dr. Barreto's report, which you say you have examined, based upon what you see in that report, namely, his statement, "The analysis made on two samples of wheat flour * * *," with the marks so and so, "gave the following result," and he lists "Chlorites * * * Presence, Sulfates * * * Traces," and so on, would you say from that report Dr. Barreto had made a quantitative analysis?

A. No, sir.

Q. He did not make a quantitative analysis?

A. Not on the basis of what that says, no.

Mr. Wakefield: That is all.

Redirect Examination

By Mr. Howard:

Q. But you are aware of the fact that in his deposition he stated he did make a quantitative analysis?

Mr. Wakefield: I object to that as not proper redirect. [357]

The Court: Overruled, but the form of it is wrong. You can ask him if he was so aware.

Q. Are you aware of that? A. Yes, sir.

Mr. Howard: No further questions.

Mr. Wakefield: That is all.

The Court: Step down.

(Witness excused.)

Mr. Howard: That is all the libelant has in rebuttal, Your Honor.

The Court: Libelant rests. Is there anything further?

Mr. Wakefield: Nothing from respondent, Your Honor.

The Court: Libelant rests and respondent rests. I will hear counsel in their arguments of the matter beginning at 9:30 o'clock Saturday morning of this week. Those connected with this case are excused until that time.

(At 2:15 o'clock, p.m., Wednesday, November 2, 1949, proceedings adjourned until 9:30 o'clock, a.m., Saturday, November 5, 1949.)

November 5, 1949

The Court: Are counsel ready to proceed?

Mr. Howard: Yes, Your Honor.

Mr. Crutcher: Yes, Your Honor.

(Arguments made by counsel on behalf of libelant and respondent.)

Court's Decision

The Court: The evidence seems to the Court to be complete from the point of view of the theory of each side. There is no dispute as to the quantity of goods shipped. That is made certainly to appear in the statements in the bills of lading. The only question is concerning the cause of the claimed damage and as to the amount in terms of dollars or cruzeiros of the damage.

The libelant by a preponderance of the evidence has established and the Court finds, concludes and decides therefrom that the goods consisted of sacks of flour were received by the respondent on board its steamship Sweepstakes at New York for shipment to Rio de Janeiro in apparent good [359] order and condition, and that the flour was also in actual good condition at the time it was so received by the defendant carrier. Such actual good order and condition is established by the testimony of the mate, who testified that, while he came aboard the ship after the loading onto the ship had commenced, he did observe the condition of the goods after he came aboard sufficiently to determine and he did determine that the goods appeared to be in good order and condition.

The Court so finds that the goods were discharged at Rio de Janeiro in bad order and condition as claimed by libelant, and that the cause of such bad order and condition and damaged condition as claimed by libelant was in the nature of sea water damage, and that such sea water damage was caused to the goods while they were in the possession of the respondent as carrier of the goods.

The Court so finds that the damage was on account of sea water contact with the goods while in the possession of the carrier, because the only opportunity disclosed by the evidence for sea water contamination was while the goods were in the possession of the carrier on board the ship in transit from New York to Rio de Janeiro. There is dis-

closed by the evidence no other possibility of sea water contamination.

There is no positive eyewitness proof that, between [360] the time of taking the goods aboard the vessel at New York and the discharge of the goods from the vessel at Rio de Janeiro, they were actually brought in contact with sea water, but it is possible that from some cause unknown during the voyage the sea water was permitted to contact the goods either by passage in and about the deck and stowage place on the vessel while the sea water was in liquid form as water, or by coming aboard in and about the cargo stowage space in the form of ocean spray. These possibilities are inferences from the fact that the ship made a voyage from New York to Rio de Janeiro with these goods on board after they were received on board in apparent and in actual good condition, and from the fact that no other possibility for contact of sea water with the goods was indicated by the evidence.

The Court believes that by the communication dated the 2nd of March, following the commencement of discharge of the cargo at Rio de Janeiro on February 21st, the respondent had as good an opportunity to make an analysis of the damage as did the libellant. The Court has no doubt of the correctness of the fact as to the nature of the damage as found by libellant's witness, Dr. Barreto. Everything connected with his deposition points to unquestioned credibility of his testimony, and I see no fact or proper inference of fact which to my mind

would tend to dispute or undermine the [361] truthfulness of his statements as to cause of damage.

I do not find any fact or circumstance in the evidence as to what occurred from the time of discharge of the goods from the vessel until their arrival at the libelant's warehouse or mill which would give rise to or establish or tend to prove that the goods were damaged by sea water or were damaged at all while being unloaded from ship to dock and/or while being transferred from dock to libelant's mill or warehouse.

By reason of all of these things mentioned by the Court, and from a preponderance of all the evidence, the Court finds, concludes and decides that the goods were damaged, as alleged, by the respondent, more specifically by respondent's improper care of the goods while they were in transit, and that the damage was caused by the respondent's negligently permitting the goods to be contacted by sea water while the goods were in transit on board the respondent's vessel Sweepstakes from New York to Rio de Janeiro.

The Court further so finds, concludes and decides that the extent and amount of the damage which the libelant has sustained by reason of the salt water damage to the goods is approximately in the amount claimed by libelant, the detail of which the Court asks counsel to consider between now and the date to be fixed by the Court for settling and [362] entering of findings of fact, conclusions of law and decree, and if on that date counsel cannot between

themselves agree as to what is the proper amount of the damage, then the Court will on that date fix the specific amount of such damage.

Mr. Crutcher: Is Your Honor fixing 35 per cent or 40 per cent?

The Court: The Court fixes 35 per cent as the depreciation in the condition and value of the goods.

(At 11:10 o'clock, a.m., Saturday, November 5, 1949, trial proceedings concluded.)

Certificate

I, Patricia Stewart, do hereby certify that I am official court reporter for the above-entitled court, and as such was in attendance upon the hearing of the foregoing matter.

I further certify that the above transcript is a true and correct record of the matters as therein set forth.

/s/ PATRICIA STEWART,
Official Court Reporter.

[Endorsed]: Filed January 17, 1949. [363]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO APOSTLES ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to designation of proctors for appellant I am transmitting as the Apostles on Appeal in this cause all original pleadings, depositions, documents, and testimony, together with libelant's offered exhibits number 1 to 5, inclusive, and respondent's offered exhibits numbered A-1 to A-4, inclusive, and that said original pleadings, depositions, documents, testimony and exhibits constitute the Apostles on Appeal from the Decree filed and entered on the Admiralty Docket on November 14, 1949, to the United States Court of Appeals for the Ninth Circuit, to wit:

1. Libel.
2. Libelant's Stipulation for Costs.
3. Proof of Service.
4. Appearance of Proctors, for Respondent. (U. S. Attorney.)
5. Appearance of Proctors for Respondent. (U. S. Attorney by Bogle, Bogle & Gates.)
6. Answer and Interrogatories, of Respondent.
7. Interrogatories Propounded by Respondent to Libelant.

8. Exceptions to Answer.

9. Objections to Interrogatories Propounded by Respondent to Libelant.

10. Notice of Hearing Libelant's Exceptions to Answer, and Libelant's Objections to Interrogatories Propounded by Respondent to Libelant.

11. Order Upon Exceptions of Libelant to Answer of Respondent.

12. Order Upon Exceptions to Respondent's Interrogatories.

13. Libelant's Answers to Respondent's Interrogatories.

14. Deposition of Howard Francis Lane, behalf respondent.

15. Deposition of Anthony Parsons, behalf respondent.

16. Depositions of A. Barreto, C. S. Botelho and John Doe Truckman, behalf libelant, and A. M. Caswell and John Doe Customs Guard, behalf respondent, with stipulations for taking attached.

16a. Letter, Department of State, transmitting above depositions to Clerk, U. S. District Court.

17. Stipulation re introduction in evidence of Bills of Lading No. 37 and No. 74.

18. Notice of Hearing Libelant's Motion to Require Respondent to Produce.

19. Libelant's Motion to Require Respondent to Produce.

20. Order on Libelant's Motion to Require Respondent to Produce Documents.

21. Deposition of Percy W. Punnett, behalf respondent.

22. Libelant's Motion for Order Limiting Issues to be Tried or, in the Alternative, for a Continuance of the Trial Date.

23. Notice of Hearing above motion.

24. Depositions of Frederick Albert Cal Rols Herold, et al.

25. Trial Brief of Libelant.

26. Respondent's Trial Brief.

27. Libelant's Supplemental Memorandum of Points and Authorities.

28. Respondent's Supplemental Memorandum of Points and Authorities.

29. Notice of Taxation of Costs Against Respondent.

30. Libelant's Memorandum of Costs and Disbursements.

31. Notice of Presentation of Findings of Fact, Conclusions of Law, and Decree.

32. Findings of Fact and Conclusions of Law.

33. Decree, for Libelant, filed November 14, 1949.

34. Court Reporter's Transcript of Court's Decision.

35. Court Reporter's Transcript of Proceedings at Trial.

36. Petition of Respondent U.S.A. for Appeal.

37. Order Granting Petition for Appeal.

38. Notice of Appeal.

39. Assignment of Errors by Respondent U.S.A.

40. Citation on Appeal.

41. Acknowledgment of Service of Petition for Appeal, and Assignment of Errors.

42. Designation of Apostles on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of said District Court at Seattle, this 16th day of March, 1950.

MILLARD P. THOMAS,
Clerk.

[Seal] By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 12510. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Cia. Luz Stearica, a Corporation, Appellee. Apostles on Appeal. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed March 23, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

Cause No. 12510

THE UNITED STATES OF AMERICA,
Appellant,
vs.

CIA. LUZ STEARICA, a Corporation,
Appellee.

APPELLANT'S STATEMENT OF POINTS
ON APPEAL AND DESIGNATION OF
PARTS OF THE APOSTLES

Comes now the appellant and herewith files in this court its Statement of Points upon which appellant intends to rely on appeal and designates the Apostles on Appeal necessary for the consideration and determination thereof pursuant to Rule 19(6) of the rules of this court (as amended, effective January 1, 1949), as follows:

1. Appellant adopts its Assignment of Errors in this cause as heretofore filed in the United States District Court for the Western District of Washington, Northern Division, in this cause in connection with the appeal and as included in the Apostles on Appeal as the Statement of Points upon which appellant intends to rely upon appeal.

2. Appellant designates the following portions of

the Apostles on Appeal as material to the consideration of the appeal:

Clerk's

Number

Item

1. Libel.

6. Answer.

7. Interrogatories propounded by respondent—4 and 17 only.

13. Libellant's answers to respondent's interrogatories—paragraphs III and XII only.

11. Order upon exceptions of libellant.

19. Libellant's motion to require respondent to produce—paragraphs (5) and (8) only.

20. Order on libellant's motion to require respondent to produce documents.

32. Findings of fact and conclusions of law.

33. Decree.

35. Transcript, except the following portions not material on this appeal, or repetitions: p. 4, line 14, through p. 5, line 5; p. 24, line 23, through p. 27, line 6; p. 48, line 13, through p. 50, line 3; p. 92, line 4, through p. 94, line 6; p. 125, line 19, through line 23; p. 127, line 18, through line 22; p. 166, line 18, through p. 168, line 13; p. 220, line 2, through line 21; p. 229, line 2, through line 11; p. 245, line 8, through line 25; p. 271, line 7, through p. 273, line 5; p. 296, line 8, through p. 300, line 10.

36. Petition for appeal.

37. Order granting petition.

38. Notice of appeal.

39. Assignment of errors.

40. Citation on appeal.

Libelant's Exhibits 1, 2, 3, 4; Respondent's Exhibits A-1, A-2, A-3, A-4.

J. CHARLES DENNIS,
United States Attorney.

BOGLE, BOGLE & GATES,
CLAUDE E. WAKEFIELD,
/s/ M. BAYARD CRUTCHER,
Of Counsel.

Proctors for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed March 24, 1950.

[Title of Court of Appeals and Cause.]

MOTION TO OMIT PRINTING OF EXHIBITS

Comes now the appellant herein and moves that the exhibits offered in evidence upon the trial of this cause, and designated as material to consideration of the appeal, be omitted from the printed record to be prepared herein, and that they may be used in their original form.

As reasons therefor, appellant respectfully shows to the court that libelant's Exhibits 3 and 4 are reproduced in the transcript (Clerk's number 35, at pp. 27, 28, 56); that libelant's Exhibits 1 and 2, and respondent's Exhibits A-1, A-2, A-3 and A-4

are not conveniently printable; that their inclusion in the record would be cumbersome and impractical in the premises; and that the substance of all of the exhibits and the material facts established by said exhibits appear otherwise in the testimony of the witnesses in the transcript of the proceedings.

J. CHARLES DENNIS,
United States Attorney.

BOGLE, BOGLE & GATES,
CLAUDE E. WAKEFIELD,
/s/ M. BAYARD CRUTCHER,
Of Counsel,

Proctors for Appellant.

It Is So Ordered, this 24th day of March, 1950.

/s/ WILLIAM HEALY.

/s/ HOMER BONE.

/s/ WALTER L. POPE.

Receipt of copy acknowledged.

[Endorsed]: Filed March 27, 1950.